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CONFRONTATION, FORFEITURE, AND *GILES V. CALIFORNIA*: AN INTERIM USER’S GUIDE

Clifford S. Fishman⁺

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I. INTRODUCTION

On September 29, 2002, Dwayne Giles shot and killed his ex-girlfriend, Brenda Avie, outside the garage of his grandmother's house.¹ At his murder trial, Giles admitted shooting her six times.² But although she was unarmed,

1. *People v. Giles*, 152 P.3d 433, 435-36 (Cal. 2007), *vacated and remanded*, 128 S. Ct. 2678 (2008).

2. All six rounds struck Ms. Avie near her torso. *Id.* at 436. As Justice Scalia wrote: One wound was consistent with Avie's holding her hand up at the time she was shot, another was consistent with her having turned to her side, and a third was consistent with her having been shot while lying on the ground. Giles fled the scene after the shooting. He was apprehended by police about two weeks later and charged with murder.

Giles v. California, 128 S. Ct. 2678, 2681 (2008).

he testified that he acted in self-defense.³ He supported this claim by describing Ms. Avie's purported prior acts of violence,⁴ telephone threats she made against him and his new girlfriend on the day of the shooting, and her menacing behavior immediately before he shot her.⁵

To cast doubt on Giles's testimony that Ms. Avie was the initial aggressor, the prosecutor called Police Officer Stephen Kotsinadelis, who testified that about three weeks before the shooting,⁶ he and his partner responded to a domestic violence report.⁷ Giles, who appeared agitated, came to the door and admitted the officers.⁸ Kotsinadelis testified that he spoke to Ms. Avie while his partner stayed with Giles.⁹ Ms. Avie told Kotsinadelis that Giles had accused her of being unfaithful, physically assaulted her, choked her, punched her, and, wielding a knife, had threatened to kill her if she cheated on him.¹⁰

Ms. Avie's statements to the officer were hearsay: out-of-court statements offered at trial to prove the truth of the matter asserted,¹¹ that is, to prove that Giles had in fact accused, assaulted, choked, punched, and threatened her. The trial court overruled Giles's hearsay objection per California Evidence Code Section 1370, which admits hearsay statements that describe the infliction or threats of physical injury made on a declarant where the declarant is unavailable and the statements are deemed trustworthy.¹² Giles was convicted of first degree murder and sentenced to fifty years to life.¹³

3. *Giles*, 128 S. Ct. at 2681.

4. *Id.* Giles testified that Avie had once shot a man, that she had used a knife to threaten others, and that, on previous occasions, she had vandalized his home and car. *Id.*

5. *Id.*

6. The California intermediate appellate court decision lists the date of this incident as September 5, 2001, *People v. Giles*, 19 Cal. Rptr. 3d 843, 846 (Ct. App. 2004), but it is clear from the rest of the facts related in that opinion and every other reported opinion in the case that this is a typographical error; the incident in fact occurred in September of 2002, only weeks before Ms. Avie was killed, *see id.* at 845–46; *see also Giles*, 128 S. Ct. at 2681.

7. *Giles*, 128 S. Ct. at 2681–82. As a rule, evidence of a defendant's other crimes, wrongs, and acts are inadmissible to prove a defendant's propensity as a way of suggesting he committed the crime for which he is currently on trial. *See* CAL. EVID. CODE § 1101 (West 2009); *see also* FED. R. EVID. 404(b). Evidence of Giles's prior assault on Ms. Avie was admitted per California Evidence Code Section 1109, an exception to Section 1101, which admits evidence of a defendant's other acts of domestic violence. *Giles*, 19 Cal. Rptr. 3d at 846.

8. *Giles*, 19 Cal. Rptr. 3d at 846.

9. *Id.*

10. *Id.* Neither the Supreme Court decision nor either of the reported state court decisions specifies whether the officer testified during the state's case-in-chief or in rebuttal after the defendant testified.

11. *See* CAL. EVID. CODE § 1200; *see also* FED. R. EVID. 801(c).

12. This provision is discussed in Part IV.G.4, *infra*.

13. *Giles*, 19 Cal. Rptr. 3d at 844–45.

Up to this point, there was nothing particularly unusual about Giles's case. Men assault, rape, and kill their present or former wives and girlfriends with appalling frequency.¹⁴

While Giles's appeal was pending, the United States Supreme Court, in *Crawford v. Washington*, rejected its prior interpretation of the Sixth Amendment Confrontation Clause and replaced it with one that created potential new barriers to hearsay evidence.¹⁵ Although *Crawford* did not involve allegations of domestic violence, its potential effect on domestic violence prosecutions, which often rely on hearsay evidence, was obvious.¹⁶

Although Giles had not asserted a Confrontation Clause objection to admission of Ms. Avie's statements to Officer Kotsinadelis, the California appellate courts permitted Giles to raise the issue on appeal.¹⁷ The state supreme court ultimately rejected Giles's Confrontation Clause claim¹⁸ on the ground that, by killing Ms. Avie, Giles had forfeited his right to confront and cross-examine her.¹⁹

In 2008, the United States Supreme Court, in a decision that produced five opinions and only a conditional majority,²⁰ held in *Giles v. California* that the state courts had used an incorrect standard in applying the forfeiture doctrine, one that was too generous to prosecutors.²¹ It therefore vacated Giles's conviction, and remanded for further consideration.²² At first look, this appears to be a victory not only for Giles, but for defendants in general. Because of the many opinions filed in the case, however, substantial questions exist as to what the correct standard is, and how it should be applied and litigated. Moreover, there are indications in *Giles* that the *Crawford* approach to the Confrontation Clause may apply in only comparatively narrow factual

14. See *infra* note 170 and accompanying text.

15. *Crawford v. Washington*, 541 U.S. 36 (2004). The Confrontation Clause, and *Crawford's* (re)construction of it, are discussed *infra* at Part II.C.

16. See Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747, 752 (2005) (arguing that "*Crawford* calls into question many of the strategies previously used by prosecutors in domestic violence cases"); Myrna Raeder, *Remember the Ladies and Children Too: Crawford's Impact on Domestic Violence and Child Abuse Cases*, 71 BROOK. L. REV. 311, 312 (2005) (criticizing the historical basis for the Court's reasoning in *Crawford*); Jeanine Percival, Note, *The Price of Silence: The Prosecution of Domestic Violence Cases in Light of Crawford v. Washington*, 79 S. CAL. L. REV. 213, 216 (2005) (arguing that "the framework the Court created is unworkable and problematic for the prosecution of domestic violence cases"). See also *United States v. Hall*, 419 F.3d 980, 989 (9th Cir. 2005) (declining to extend *Crawford's* testimonial restriction to a domestic violence allegation); *Davis v. State*, 169 S.W.3d 660, 671 (Tex. App. 2005) (noting that the "proper interpretation of *Crawford* can have a great impact upon" domestic violence trials in which the victim does not testify).

17. See *People v. Giles*, 152 P.3d 433, 437 (Cal. 2007).

18. *Id.* at 435.

19. *Id.*

20. See discussion *infra* Part III.B.1.

21. See *Giles v. California*, 128 S. Ct. 2678, 2693 (2008).

22. *Id.*

settings; if this proves to be the case, *Giles* might wind up helping prosecutors as much, if not more, than it helps defendants.

This Article examines the implications of *Giles v. California*. It begins in Part II by examining the Confrontation Clause before *Giles*, and explains how *Crawford* upended the Clause's prior interpretation in *Ohio v. Roberts*²³ by excluding all "testimonial" statements, however "trustworthy" a court might consider them to be. It then provides a brief explanation of the forfeiture doctrine and its endorsement in *Crawford*. Part III consists of a detailed examination and critique of the Court's resolution of the central issue in *Giles*: that the forfeiture doctrine applies only when the prosecution can show that the defendant killed the victim-declarant with the intent of preventing her from testifying. It scrutinizes the majority, two concurrences, and dissent, and posits that because of the content of the opinions, the view garnered only a conditional majority at best. Part IV explores how the forfeiture issue should be litigated, and in particular, how a prosecutor should attempt to satisfy the *Giles* "intent to silence" requirement in a variety of contexts: domestic homicides, domestic assaults, and crimes unrelated to domestic relationships. It also provides an overview of the hearsay exceptions that will often overcome a defendant's hearsay exception. Part V shows how four of the *Giles* opinions can be read to evince a willingness to either reconsider or narrow the definition of testimonial. Part VI provides a brief conclusion.

II. THE CONFRONTATION CLAUSE: *ROBERTS*; *CRAWFORD*; *DAVIS*

A. *The Confrontation Clause*

The Sixth Amendment provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him"²⁴ American courts have long agreed that "to be confronted" means the right to be in the courtroom with a witness, to look at him face-to-face, and to cross-examine him.²⁵ Thus, the scope of the

23. 448 U.S. 56 (1980).

24. U.S. CONST. amend. VI.

25. *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988) ("[T]he Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact."). The Supreme Court has recognized only one exception to this definition of confrontation. Where a child is to testify against his or her alleged abuser and the prosecutor persuades the judge that the child will be unable to do so in the defendant's physical presence or that the child will suffer considerable trauma by doing so, the child may testify in a separate room—so long as cameras and TV screens are positioned so that the defendant, judge, and jury can all see the child, and the child can see the defendant—if the child chooses to look at the screen. *Maryland v. Craig*, 497 U.S. 836, 840–43 (1990). For an analysis of *Craig* and its progeny, see 4 CLIFFORD S. FISHMAN & ANNE T. MCKENNA, JONES ON EVIDENCE §§ 25A:51–56, at 176–93 (7th ed. Supp. 2008). The continued validity of this body of case law is questionable in light of *Crawford v. Washington*.

Confrontation Clause, at least to a textualist, depends on how one reads the word “witness.” There are three plausible interpretations.²⁶

The narrowest view restricts “witness” to someone who actually takes the stand and testifies at the defendant’s criminal trial.²⁷ This would assure the defendant the right to confront only those who actually testify against him at trial, but the admissibility of all out-of-court (that is, hearsay) statements made by declarants who do not testify would be beyond the scope of the Clause, and would be regulated solely by the rules of evidence governing hearsay. A majority of the court said in 1992 that “[s]uch a narrow reading of the Confrontation Clause, which would virtually eliminate its role in restricting the admission of hearsay testimony, is foreclosed by our prior cases” dating at least to 1895.²⁸

The broadest view is that the term “witness” applies to anyone whose statement is offered against the defendant.²⁹ The effect would be to preclude the prosecutor from introducing any hearsay evidence at all unless the declarant actually testifies at trial, a result the Court has properly rejected as “too extreme.”³⁰

The middle view is that, in addition to in-court testimony, the Clause applies to some, but not all, hearsay evidence. American courts have always understood this middle approach to be the correct one.³¹ Thus, the challenge is to define which hearsay statements are subject to the Clause, and which are not.

B. Roberts

From 1980 until the *Crawford* decision in 2004, application of the Confrontation Clause was governed by the standard articulated by the Supreme Court in *Ohio v. Roberts*.³² In that case the Court, reasoning that the underlying goal of the Clause was to safeguard against the use of untrustworthy evidence, held that a prosecutor could introduce hearsay statements without also calling the declarant as a witness, so long as the statement had sufficient “indicia of reliability.”³³ Reliability could be established in either of two ways. One was to show that the statement came

26. *Crawford v. Washington*, 541 U.S. 36, 42–43 (2004).

27. *See id.*

28. *White v. Illinois*, 502 U.S. 346, 352 (1992) (citing *Mattox v. United States*, 156 U.S. 237 (1895)).

29. *See Ohio v. Roberts*, 448 U.S. 56, 62–63 (1980).

30. *Id.* at 63 (“[I]f thus applied, the Clause would abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme.”).

31. *White*, 502 U.S. at 352 (“[W]e have consistently sought to ‘steer[r] a middle course’” (alteration in original) (quoting *Roberts*, 448 U.S. at 68, n.9)).

32. 448 U.S. 56.

33. *Id.* at 66 (quoting *Mancusi v. Stubbs*, 408 U.S. 204, 213 (1972)).

within a “firmly rooted” hearsay exception.³⁴ If a hearsay statement did not fall within a “firmly rooted” exception, a prosecutor could demonstrate the statement’s reliability by making a “showing of particularized guarantees of trustworthiness.”³⁵

C. Crawford: The “Testimonial” Test

In the summer of 1999, Kenneth Lee allegedly tried to rape Michael Crawford’s wife, Sylvia.³⁶ A few hours later, when the Crawfords confronted Lee, Michael Crawford stabbed him.³⁷ Michael pleaded self-defense, claiming that he thought Lee was reaching for a weapon.³⁸ To rebut this defense, the prosecutor played a recording of Sylvia’s interview with the police,³⁹ which cast doubts on Michael’s version of events.⁴⁰ At trial and on appeal, Crawford argued that admitting the recording violated his Sixth Amendment right to be “confronted with the witnesses against him.”⁴¹

In *Crawford v. Washington*, the Supreme Court, per Justice Scalia, held that admitting Sylvia’s hearsay statement violated Michael Crawford’s rights under the Confrontation Clause.⁴² In so doing, the Court rejected the *Roberts* approach to the Confrontation Clause⁴³ for three main reasons.

First, the Court concluded that the *Roberts* approach was inconsistent with the history of the Confrontation Clause.⁴⁴ According to Justice Scalia’s reading of the history, the clause was included in the Sixth Amendment to preclude a prosecutor from using at trial pretrial judicial interviews of witnesses, conducted in the defendant’s absence, where those witnesses were absent from the trial itself.⁴⁵ Although the ultimate purpose of the Clause was to help assure that criminal convictions were based on reliable and trustworthy evidence, Justice Scalia insisted that the Founders intended to accomplish this objective by mandating a specific procedure, that is, the right to confront and cross-examine.⁴⁶ Justice Scalia observed that “[d]ispensing with confrontation

34. *Id.*

35. *Id.*

36. *Crawford v. Washington*, 541 U.S. 36, 38 (2004).

37. *Id.*

38. *Id.* at 38–40.

39. Sylvia did not testify at trial because Crawford invoked Washington’s marital privilege, “which generally bars a spouse from testifying without the other spouse’s consent.” *Id.* at 40 (citing WASH. REV. CODE § 5.60.060(1) (1994)).

40. *Id.* at 39.

41. *Id.* at 40.

42. *Id.* at 68–69.

43. *Id.* at 65–69.

44. *Id.* at 60.

45. *Id.* at 53–54.

46. *Id.* at 61 (“To be sure, the Clause’s ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of

because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.”⁴⁷

Second, the *Roberts* “trustworthiness” rule was so vague and imprecise that it was impossible to apply objectively,⁴⁸ and therefore afforded excessive discretion to judges in direct violation of a constitutional right.⁴⁹

The third and greatest shortcoming of the *Roberts* approach, Justice Scalia wrote in *Crawford*, was that it permitted judges to admit into evidence “core testimonial statements that the Confrontation Clause plainly meant to exclude.”⁵⁰ The Confrontation Clause must be read to exclude any “testimonial” statement that a prosecutor offers into evidence, unless the declarant testifies at trial, or unless the defendant had an opportunity to confront and cross-examine the declarant on a previous occasion.⁵¹ Such a “core class of ‘testimonial’ statements,” Justice Scalia added, include statements extracted during custodial interrogations,⁵² guilty plea allocutions by a defendant, when offered against a non-pleading defendant, to show the existence of a conspiracy;⁵³ and testimony given at a prior trial or proceeding at which the defendant had no opportunity to cross-examine the declarant.⁵⁴ Each of these, the majority stated, was the functional equivalent of the judicial questioning the Confrontation Clause was intended to exclude from evidence at trial.⁵⁵

Thus, a key question in post-*Crawford* Confrontation Clause litigation is whether the statement in question is “testimonial.” The Court did not provide an explicit definition of the term, but offered several hints. First, it observed, “[a]n off-hand, overheard remark might be unreliable evidence and thus a good

cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.”). It was not intended to give judges a general right to admit or exclude hearsay evidence based on their own assessments of trustworthiness. *Id.*

47. *Id.* at 62.

48. *Id.* at 63. Justice Scalia pointed out that some judges relied on certain factors to indicate that a statement was reliable; other judges cited those same factors to indicate that a statement was unreliable. *Id.*

49. *See id.* at 67.

50. *Id.* at 63.

51. *Id.* at 53–54.

52. *Id.* at 51. In *Lilly v. Virginia*, 527 U.S. 116, 137 (1999), a four-judge plurality strongly suggested it was doubtful that “accomplice confessions implicating the accused could survive *Roberts*.” *Crawford*, 541 U.S. at 63–64. Nevertheless, as Justice Scalia pointed out in *Crawford*, “courts continue routinely to admit [accomplice confessions].” *Id.* at 64. The Court also noted one study that found that after *Lilly*, appellate courts upheld the admission of such statements in 25 of 70 cases. *Id.* (citing Roger W. Kirst, *Appellate Court Answers to the Confrontation Questions in Lilly v. Virginia*, 53 SYRACUSE L. REV. 87, 105 (2003)).

53. *Crawford*, 541 U.S. at 63–64.

54. *Id.* at 57.

55. *See id.* at 68.

candidate for exclusion under hearsay rules, but it bears little resemblance to the civil-law abuses the Confrontation Clause targeted.”⁵⁶ Second, the Court continued by explaining that

[t]he text of the Confrontation Clause . . . applies to “witnesses” against the accused—in other words, those who “bear testimony.” “Testimony,” in turn, is typically “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.” An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.⁵⁷

It was unnecessary to provide a precise definition of “testimonial” to resolve Crawford’s case, the Court observed, because formal interrogation of a witness by police officers, such as the one that elicited Sylvia Crawford’s statement, was clearly testimonial under any definition.⁵⁸

D. The Forfeiture Doctrine

Although the Court in *Crawford* declined to provide a precise definition of “testimonial,” it offered several statements in dicta about when the Clause would or would not exclude testimony. For example, the Court gratuitously stated that business records and statements by co-conspirators clearly were not testimonial.⁵⁹ Statements offered for a non-hearsay purpose would not run afoul of the Confrontation Clause because their relevance did not depend on the truth of the matter asserted.⁶⁰ And, of particular significance, the Court stated: “the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds; it does not purport to be

56. *Id.* at 51.

57. *Id.* (second alteration in original) (citations omitted) (quoting 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)). The Court also offered three possible “formulations” of how a “testimonial statement” might be defined:

[1.] [E]x parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially[.]

[2.] [E]xtrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions[.]

[3.] [S]tatements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

Id. at 51–52 (omission in original) (citations omitted) (internal quotation marks omitted).

58. *Id.* at 61, 68.

59. *Id.* at 56. On November 10, 2008, the Court heard oral argument in *Melendez-Diaz v. Massachusetts*, in which the Court was asked to determine whether laboratory reports are “testimonial.” See Transcript of Oral Argument at 3–4, *Melendez-Diaz v. Massachusetts*, No. 07-591 (U.S. Nov. 10, 2008).

60. *Crawford*, 541 U.S. at 59 n.9.

an alternative means of determining reliability.”⁶¹ For this principle, the Court cited *Reynolds v. United States*, a nineteenth century case in which the Court held that if a defendant procured a declarant’s unavailability to prevent the declarant from testifying against him, he thereby forfeited his right to raise a Confrontation Clause objection when the declarant’s hearsay statements were offered against him at trial.⁶²

E. *Davis v. Washington*

In *Davis v. Washington*, the Supreme Court consolidated appeals in two domestic violence cases, *Davis v. Washington* and *Hammon v. Indiana*.⁶³

1. *Davis v. Washington*

During an emotional conversation with a 911 operator, Michelle McCottry frantically told the operator that Davis, her former boyfriend, was “here jumpin’ on me again,” and, in response to the operator’s question, that he did not have a weapon, “[h]e’s usin’ his fists.”⁶⁴ She gave the operator Davis’s name, then added, “[h]e’s runnin’ now,” meaning that Davis had “[j]ust r[un] out the door’ after hitting Ms. McCottry, and that he was leaving in a car with someone else.”⁶⁵ The operator then proceeded to ask Ms. McCottry additional questions about Davis and her relationship with him.⁶⁶ The police arrived within four minutes of the 911 call.⁶⁷

2. *Hammon v. Indiana*

In *Hammon*, police officers responding to a “reported domestic disturbance” found Mrs. Amy Hammon sitting alone on the front porch of the family home.⁶⁸ Although she seemed “somewhat frightened,” she told them that “nothing was the matter.”⁶⁹ With her permission they entered the home and saw evidence of minor damage and broken glass on the floor.⁷⁰ Ultimately, one of the officers interviewed Mrs. Hammon, who told him that her husband had assaulted her; at the officer’s request, she filled out and signed an affidavit to that effect.⁷¹

61. *Id.* at 62.

62. *Reynolds v. United States*, 98 U.S. 145, 158–59 (1878).

63. *Davis v. Washington*, 547 U.S. 813, 813 & n.* (2006).

64. *Id.* at 817. The 911 recording captures sounds of a male yelling in the background, but it is unclear whether Davis was actually punching Ms. McCottry as she was speaking to the operator.

65. *Id.* at 818 (second alteration in original).

66. *Id.*

67. *Id.*

68. *Id.* at 819 (internal quotation marks omitted).

69. *Id.* (internal quotation marks omitted).

70. *Id.*

71. *Id.* at 820.

3. “Testimonial” Versus “Non-Testimonial” Statements to the Police

Ms. McCottry did not testify at Davis’s trial for felony violation of a protection order; nor did Mrs. Hammon testify at her husband’s trial for domestic violence and violation of his probation.⁷² In each case the police officers testified about the woman’s physical and emotional condition when they arrived.⁷³ The Washington prosecutor played the 911 recording against Davis; the Indiana prosecutor introduced Mrs. Hammon’s affidavit.⁷⁴ Each defendant was convicted and subsequently appealed, Davis arguing that the 911 recording, and Hammon that his wife’s affidavit, should have been excluded as testimonial.⁷⁵

As it did in *Crawford*, the Court again in *Davis* declined to provide “an exhaustive classification of all conceivable statements—or even all conceivable statements in response to police interrogation—as either testimonial or nontestimonial.”⁷⁶ Rather, it set forth the following distinction as sufficient to decide the *Davis* and *Hammon* cases:

Statements are non-testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.⁷⁷

Applying this test, the Court concluded that Ms. McCottry’s statements to the 911 operator before Davis left the scene were non-testimonial;⁷⁸ Ms. McCottry’s subsequent statements, and all of Mrs. Hammon’s oral and written statements to the police, were testimonial.⁷⁹ The Court also held that the Confrontation Clause is simply inapplicable to non-testimonial statements.⁸⁰

72. *Id.* at 818–20.

73. *Id.*

74. *Id.* at 819–20.

75. *Id.* at 819, 821.

76. *Id.* at 822.

77. *Id.* The Court carefully noted that it restricted its discussion to statements elicited by “interrogation” because those were the facts before it, and was making no suggestion regarding the classification of statements not elicited by “interrogation.” *Id.* at 822 n.1. The Court assumed without deciding that the 911 operator in that case was a “police agent,” *id.* at 823 n.2, and that her questioning of Ms. McCottry was therefore the functional equivalent of police interrogation, *see id.*

78. *Id.* at 828.

79. *Id.* at 828–29, 831–32.

80. *Id.* at 825.

4. Domestic Violence and the Forfeiture Doctrine

While insisting that those charged with domestic violence were entitled to the full protection of the Confrontation Clause, the Court stressed:

[W]hen defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce. While defendants have no duty to assist the State in proving their guilt, they *do* have the duty to refrain from acting in ways that destroy the integrity of the criminal-trial system. We reiterate what we said in *Crawford*: that “the rule of forfeiture by wrongdoing . . . extinguishes confrontation claims on essentially equitable grounds.” That is, one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.⁸¹

F. Non-Retroactivity: *Whorton v. Bockting*

In *Whorton v. Bockting*,⁸² the Court held that *Crawford* applied only prospectively, not retroactively.⁸³ It also reiterated that the Confrontation Clause applies only to testimonial statements, and does not affect the admissibility of non-testimonial hearsay statements.⁸⁴

III. GILES v. CALIFORNIA

In 2008, the Supreme Court decided *Giles v. California*,⁸⁵ its fourth Confrontation Clause decision since *Crawford*.⁸⁶ *Giles*, like the Hammon and Davis incidents the Court examined in *Davis v. Washington*, involved a domestic violence victim’s statements elicited by police officers.⁸⁷ The facts in *Giles* differ from those in the *Davis* cases, however, in several significant respects. First, unlike the statements in the *Davis* cases, which were made to the police during or after the assault for which the defendant was on trial,⁸⁸ the victim’s statements in *Giles* were made to the police three weeks before the crime with which Giles was later charged.⁸⁹ Second, unlike the cases in *Davis*, the prosecutor offered the victim’s statement under a hearsay exception more

81. *Id.* at 833 (citation omitted) (quoting *Crawford v. Washington*, 541 U.S. 36, 62 (2004)).

82. 127 S. Ct. 1173 (2007).

83. *Id.* at 1181–84.

84. *Id.* at 1183.

85. 128 S. Ct. 2678 (2008).

86. *Davis* consisted of two such cases, see discussion *supra* at Part II.E. *Whorton v. Bockting*, 127 S. Ct. 1173 (2007), in which the Court held that *Crawford* was not retroactive, was the third case. *Giles v. California*, 128 S. Ct. 2678 (2008), was, therefore, the fourth case.

87. The Court assumed in *Davis* that the 911 operator was acting as an agent of the police. See *supra* note 77.

88. *Washington v. Davis*, 547 U.S. 813, 817–20 (2006).

89. *Giles*, 128 S. Ct. at 2681.

or less akin to the forfeiture-by-wrongdoing concept,⁹⁰ which the Supreme Court had explicitly endorsed (albeit in dicta) in both *Crawford*⁹¹ and *Davis*.⁹²

Third, unlike the hearsay declarant-complainants in the *Hammon* and *Davis* cases, each of whom apparently chose (whether under compulsion or not) not to testify against her assailant, the declarant in *Giles* could make no such choice because she was dead: Giles had shot her six times and killed her.⁹³

A. The “Purpose” or “Design” Issue

California’s Supreme Court held in *Giles* that the prosecutor could invoke the forfeiture doctrine and introduce the declarant’s testimonial statements simply by proving to the judge, by a preponderance of the evidence,⁹⁴ that the defendant killed the declarant; and that because the prosecutor satisfied this burden, Ms. Avie’s testimonial statements were properly admitted against Giles, and the jury could consider them in deciding whether Giles’s guilt has been established beyond a reasonable doubt.⁹⁵ Some courts considering the issue had held to the contrary, reasoning that the prosecutor must first establish that the defendant’s wrongdoing was committed with the purpose or motive of preventing the declarant from testifying.⁹⁶ However, the California court rejected this approach under a simple equity theory, reasoning that a defendant should not benefit from his own wrongdoing.⁹⁷

B. The Result in *Giles*: By the Numbers

Three Justices rejected the concept altogether, and those who endorsed it produced different approaches to what it entailed and how it might be established.

1. The Result

The holding of the Court, to the extent that the case can be said to have a holding, is that the forfeiture doctrine applies only when the prosecutor can

90. *Id.* at 2682. See discussion of CAL. EVID. CODE § 1370 *infra* at Part IV.G.4. Although at trial, the statements were originally offered under the California evidence provision that permitted admission of statements regarding bodily injury occurring around the time of the threat, *Giles*, 128 S. Ct. at 2682, the California appellate courts affirmed the admission of the statements based on *Crawford*’s recognition of the forfeiture-by-wrongdoing exception, decided during the pendency of the California appeal, *id.* By contrast, in the *Davis* and *Hammon* cases, the prosecutor relied on the excited utterance exception to overcome the defendant’s hearsay objections. See *Davis*, 547 U.S. at 820; *State v. Davis*, 111 P.3d 844, 847 (Wash. 2005) (en banc).

91. 541 U.S. 36, 62 (2004) (accepting the rule of forfeiture by wrongdoing).

92. 547 U.S. at 833 (reiterating *Crawford*).

93. *Giles*, 128 S. Ct. at 2681.

94. Concerning this burden of proof, see *infra* Part IV.G.1.

95. *People v. Giles*, 152 P.3d 433, 445, 447 (Cal. 2007).

96. *Id.* at 442.

97. *Id.*

establish that “the defendant engaged in conduct *designed* to prevent the witness from testifying.”⁹⁸ Because the state court had not applied the correct standard in evaluating whether Giles had forfeited his rights under the Confrontation Clause, the Court vacated his conviction and remanded, observing that “the [state] court is free to consider evidence of the defendant’s intent on remand.”⁹⁹

The majority justified its conclusions on two primary bases: the history of the Confrontation Clause and the forfeiture doctrine,¹⁰⁰ and the effect that a contrary result would have on a defendant’s right to trial by jury.¹⁰¹ Given the positions taken by the Justices in the five opinions written by Justices Scalia, Souter, Thomas, Alito, and Breyer in the case, however, the best that can be said is the Court’s emphasis on the defendant’s intent or purpose garnered the support of only a conditional majority of the Justices. The fractured nature of the decision is reflected in the fact that the phrase “we hold” does not appear anywhere in any opinion filed by any Justice in the case.¹⁰²

2. *By the Numbers*

Justice Scalia delivered the Court’s opinion.¹⁰³ Chief Justice Roberts joined every aspect of that opinion.¹⁰⁴ Justice Souter, with whom Justice Ginsburg agreed, joined most of Justice Scalia’s opinion,¹⁰⁵ but not Part II-D-2 of that opinion.¹⁰⁶ Excluding Part II-D-2,¹⁰⁷ that brings the total number of votes to

98. *Giles*, 128 S. Ct. at 2680.

99. *Id.* at 2693. On remand, the state attempted to “entice” the California Supreme Court to hold that, on the facts of the case, the error was harmless. E-mail from Donald DeNicola, Deputy Solicitor General, Office of the Attorney General of California, Counsel for Respondent (Dec. 31, 2008, 03:35 EST) (on file with the *Catholic University Law Review*). The court, however, remanded the case back to the California Court of Appeals for further proceedings. On remand, the California Court of Appeals asked the parties to submit briefs addressing the question of whether the victim’s statements were in fact “testimonial,” and if so, whether the evidence “showed the witness-tampering ‘motive’ that *Giles v. Calif[ornia]* said was required.” *Id.*

The court of appeals found that, because of the absence of sufficient evidence submitted by the prosecution at trial on either issue, the victim’s statements were testimonial and a witness-tampering motive was not shown. *People v. Giles*, 2d Crim. No. B166937, 2009 WL 457832, at *3–4 (Cal. Ct. App. Feb. 25, 2009).

100. *Giles*, 128 S. Ct. at 2682–84; *see also infra* Part III.C.1.

101. *Giles*, 128 S. Ct. at 2684–86; *see also infra* Part III.C.2.

102. Indeed, the phrase “designed to prevent,” quoted in the previous paragraph, appears in a sentence of Justice Scalia’s opinion for the Court that discusses the history of the Confrontation Clause. It is clear that this is the rationale that garnered the greatest support on the Court. *See infra* Part III.C.3.

103. *Giles*, 128 S. Ct. at 2680.

104. *Id.*

105. *Id.* Justice Souter’s opinion is discussed *infra* at Part IV.C.

106. *Giles*, 128 S. Ct. at 2680.

107. Part II-D-2 of Justice Scalia’s opinion, and the disinclination of Justices Souter and Ginsburg to join it, are discussed in Part III.C.4 of this Article.

four. Although the syllabus that is published with the opinion indicates that Justices Thomas and Alito joined Justice Scalia's entire opinion, including Part-II-D-2,¹⁰⁸ the content of their concurrences show why their votes should not be reflexively counted as supporting that opinion. Indeed, as is set forth in Part V, as a practical matter, Justice Thomas more accurately should be counted as a vote *against* Justice Scalia's approach, and Justice Alito's support for Justice Scalia is tentative at best.¹⁰⁹

Three Justices—Justice Breyer, with whom Justices Stevens and Kennedy joined—dissented from the Scalia-Roberts-Souter-Ginsburg-Alito majority, arguing that it should suffice that the prosecutor establish that the defendant knew that killing the declarant would preclude any possibility of the declarant from testifying, whether or not that was the defendant's purpose or specific intent.¹¹⁰ In asserting this position, the dissent rejected both the majority's reading of the Clause's history and the forfeiture doctrine and the majority's concern about how the dissenters' approach would affect a defendant's right to trial by jury.¹¹¹ The dissent also hinted at some dissatisfaction with the classification of Ms. Avie's statement as testimonial.¹¹² The implications of this aspect of the dissent, and the Alito-Thomas concurrences, are discussed in Part V.

C. Rationale for the Decision: Concurring and Dissenting Opinions

1. The History of the Confrontation Clause and the Forfeiture Doctrine

Justice Scalia based his opinion primarily on his reading of the history of the Confrontation Clause, the forfeiture rule, and their common-law antecedents.¹¹³ Indeed, Justice Scalia's examination of that history occupies approximately two thirds of his opinion for the Court.¹¹⁴ Justice Scalia's conclusion is set out below.¹¹⁵ In his dissent, Justice Breyer confronted Justice

108. *Giles*, 128 S. Ct. at 2680.

109. *See infra* Part V.

110. *Giles*, 128 S. Ct. at 2695 (Breyer, J., dissenting).

111. *Id.* at 2700–01, 2707.

112. *Id.* at 2695.

113. *Id.* at 2682 (majority opinion). "We held in *Crawford* that the Confrontation Clause is 'most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding.'" *Id.* at 2688 (quoting *Crawford v. Washington*, 541 U.S. 36, 54 (2004)).

114. Justice Scalia's opinion in its entirety is 7548 words long (as "counted" by the WordPerfect word-count application), of which at least 5107 words are devoted directly to a discussion of historical precedents and authorities, the most recent of which is *Reynolds v. United States*, 98 U.S. 145 (1879).

115. Justice Scalia concluded:

In sum, our interpretation of the common-law forfeiture rule is supported by (1) the most natural reading of the language used at common law; (2) the absence of common-law cases *admitting* prior statements on a forfeiture theory when the defendant had not engaged in conduct designed to prevent a witness from testifying; (3) the common

Scalia's historical analysis with an almost equally lengthy rebuttal¹¹⁶ that led Justice Breyer in the opposite direction, although ultimately he concluded that the historical record was simply too scant to dictate the result.¹¹⁷

Justice Souter, with whom Justice Ginsburg joined, commented, "I am convinced that the Court's [Justice Scalia's] historical analysis is sound,"¹¹⁸ but agreed with Justice Breyer that this history was too thin a basis to be dispositive, at least in cases involving domestic violence:

The contrast between the Court's and Justice Breyer's careful examinations of the historical record tells me that the early cases on the exception were not calibrated finely enough to answer the narrow question here. The historical record as revealed by the exchange simply does not focus on what should be required for forfeiture when the crime charged occurred in an abusive relationship or was its culminating act; today's understanding of domestic abuse had no apparent significance at the time of the Framing, and there is no early example of the forfeiture rule operating in that circumstance.¹¹⁹

Declining to rush in where angels fear to tread,¹²⁰ and lacking the time and resources that the attorneys, Justices, and their law clerks devoted to the question, your humble author eschews any attempt to referee the matter.¹²¹

law's uniform exclusion of uncontroverted inculpatory testimony by murder victims (except testimony given with awareness of impending death) in the innumerable cases in which the defendant was on trial for killing the victim, but was not shown to have done so for the purpose of preventing testimony; (4) a subsequent history in which the dissent's broad forfeiture theory has not been applied. The first two and the last are highly persuasive; the third is in our view conclusive.

Giles, 128 S. Ct. at 2688.

116. Justice Breyer's dissent totals 8584 words, of which approximately 4424 focused on the history of the Clause and the forfeiture doctrine.

117. Justice Breyer concluded:

While I have set forth what I believe is the better reading of the common-law cases, I recognize that different modern judges might read that handful of cases differently. All the more reason then *not* to reach firm conclusions about the precise metes and bounds of a contemporary forfeiture exception by trying to guess the state of mind of 18th century lawyers when they decided *not* to make a particular argument, *i.e.*, forfeiture, in a reported case.

Giles, 128 S. Ct. at 2707 (Breyer, J., dissenting).

118. *Id.* at 2694 (Souter, J., concurring in part).

119. *Id.* at 2694-95.

120. *Cf.* Alexander Pope, *An Essay on Criticism*, in LITERARY CRITICISM OF ALEXANDER POPE 3, 19 (Bertrand A. Goldgar ed., 1965) (1711).

121. No doubt, lengthy and worthwhile law review articles will be forthcoming on the subject. For an interesting and concise critique of the historical bases of Justice Scalia's opinion, see Professor Richard Friedman's blog post, *Reflections on Giles, Part 1: History, Dying Declarations, and Forfeiture*, The Confrontation Blog, <http://confrontationright.blogspot.com/> (June 29, 2008, 01:39 EST).

2. “Guilt by a Preponderance” and the Right to Trial by Jury

As noted earlier, California’s Supreme Court held in *Giles* that the prosecutor could invoke the forfeiture doctrine and introduce the declarant’s testimonial statements simply by proving to the judge, by a preponderance of the evidence,¹²² that Giles killed Ms. Avie. Justice Scalia, speaking for a majority of the Court,¹²³ condemned this approach as inconsistent with the right to a jury trial:

The notion that judges may strip the defendant of a right that the Constitution deems essential to a fair trial, on the basis of a prior *judicial* assessment that the defendant is guilty as charged, does not sit well with the right to trial by jury. It is akin, one might say, to “dispensing with jury trial because a defendant is obviously guilty.”¹²⁴

Justice Scalia added that requiring the prosecutor to establish that the defendant acted with the intent to prevent the victim’s testimony was necessary to avoid a principle repugnant to our constitutional system of trial by jury: that those murder defendants whom the judge considers guilty (after less than a full trial, mind you, and of course before the jury has pronounced guilt) should be deprived of fair-trial rights, lest they benefit from their judge-determined wrong.¹²⁵

Justices Souter and Ginsburg, concurring, explicitly agreed with Justice Scalia:

[W]hen a defendant is prosecuted for the very act that causes the witness’s absence, homicide being the extreme example[, i]f the victim’s prior statement were admissible solely because the defendant kept the witness out of court by committing homicide, admissibility of the victim’s statement to prove guilt would turn on finding the defendant guilty of the homicidal act causing the absence; evidence that the defendant killed would come in because the defendant probably killed. The only thing saving admissibility and liability determinations from question begging would be (in a jury case) the distinct functions of judge and jury: judges would find by a preponderance of evidence that the defendant killed (and so would admit the testimonial statement), while the jury could so find only on proof beyond a reasonable doubt. Equity demands something more

122. Concerning this burden of proof, see *infra* Part IV.G.1.

123. Justice Scalia, Chief Justice Roberts, and Justices Souter, Ginsburg, and Alito.

124. *Giles*, 128 S. Ct. at 2686 (quoting his own opinion in *Crawford v. Washington*, 541 U.S. 36, 62 (2004)). Note that this passage appears in Part II-B of Justice Scalia’s opinion, with which Chief Justice Roberts and Justices Souter, Ginsburg, and Alito all concurred.

125. *Id.* at 2691. This language appears in Part II-D-2, which was joined only by Chief Justice Roberts and Justice Alito. It is, however, essentially duplicative of the passage in Part II-B, quoted immediately previous.

than this near circularity before the right to confrontation is forfeited, and more is supplied by showing intent to prevent the witness from testifying.¹²⁶

Justice Alito, who “join[ed] the Court’s opinion,”¹²⁷ presumably also agreed with this reasoning.

The dissent, rejecting this argument, made two basic points. First, Justice Breyer pointed out that the majority, despite its qualms about relying on the trial judge’s preliminary finding of culpability, nonetheless accepted the necessity of such a finding in its own approach.¹²⁸ Second, Supreme Court precedent existed for this dual-finding approach.¹²⁹ Not surprisingly, the majority dismissed these arguments.¹³⁰

As to his first point, Justice Breyer accurately pointed out, “any forfeiture rule,” including the one propounded by Justice Scalia, “requires a judge to determine as a preliminary matter that the defendant’s own wrongdoing caused the witness to be absent.”¹³¹

In response, Justice Scalia conceded that such a “preliminary evidentiary ruling” of guilt is sometimes necessary when, for example, “the defendant is on trial for murdering a witness in order to prevent his testimony.”¹³² The majority accepted this “exception to ordinary practice,” because it was “(1) needed to protect the integrity of court proceedings, (2) based upon longstanding precedent, and (3) much less expansive than the exception proposed by the dissent.”¹³³ Of these three points,¹³⁴ the one meriting emphasis here is the third: the dissent’s proposal would permit a prosecutor to invoke the forfeiture exception in order to offer the victim’s testimonial statements whenever the defendant is charged with killing the declarant, regardless of the motive or purpose for the killing. This approach would clearly apply in more cases than the one adopted by the majority.

Justice Breyer also rejected the majority’s conclusion that his approach to forfeiture, requiring only a preliminary finding by the judge that the defendant is guilty, would be the equivalent of “dispensing with jury trial.”¹³⁵ Instead,

126. *Id.* at 2694 (Souter, J., concurring in part) (agreeing with the Court’s forfeiture-by-wrongdoing analysis).

127. *See id.* at 2694 (Alito, J., concurring).

128. *Id.* at 2707–08 (Breyer, J., dissenting).

129. *Id.* at 2707.

130. *Id.* at 2691 n.6 (majority opinion).

131. *Id.* at 2707 (Breyer, J., dissenting) (citing *id.* at 2693 (majority opinion), where Justice Scalia acknowledged this necessity).

132. *Id.* at 2691 (majority opinion).

133. *Id.*

134. The dissent clearly agreed with Justice Scalia’s first point, because the dissent also emphasized the need to prevent a defendant from profiting by his own wrongdoing in the context of judicial proceedings. *Id.* at 2697 (Breyer, J., dissenting). The disagreement over the historical record has been discussed briefly in Part III.C.1, *supra*.

135. *Giles*, 128 S. Ct. at 2707 (Breyer, J., dissenting) (quoting *id.* at 2686 (majority opinion)).

Justice Breyer pointed out that the Court had adopted just such an approach in 1987 in applying the co-conspirator exception to the hearsay rule.¹³⁶ In *Bourjaily v. United States*, the Court held that to secure admissibility of a declarant's statement against a non-declarant defendant via the co-conspirator exception, the prosecutor must persuade the judge by a preponderance of the evidence that (among other things) a conspiracy existed and that the defendant was a member of it, both of which are facts the prosecutor must prove to the jury beyond a reasonable doubt in order to convict the defendant of conspiracy.¹³⁷ Justice Scalia dismissed this as insignificant, reasoning that because co-conspirator statements are non-testimonial,¹³⁸ their admission into evidence does not raise Confrontation Clause issues in the first place, whereas a testimonial statement like that in *Giles* always will raise such issues.¹³⁹ Thus, unlike Confrontation Clause forfeiture, the co-conspirator exception does not involve depriving a defendant of a constitutional right based on a mid-trial judicial finding of guilt.¹⁴⁰

136. *Id.* (citing *Bourjaily v. United States*, 483 U.S. 171, 175–76 (1987)). Justice Breyer also pointed to other legal precedents, arguing that, by analogy, they supported his approach that intentional killing by itself would suffice to forfeit the protection of the Confrontation Clause. These include the common-law doctrine that prohibits a life insurance beneficiary who murders an insured from recovering under the policy regardless of why the beneficiary committed the crime, and the common-law doctrine that someone who murders a testator cannot inherit under the will. *Id.* at 2697.

137. *Bourjaily*, 483 U.S. at 174. *Bourjaily* was charged with conspiring to distribute cocaine and with possession of cocaine with intent to distribute. *Id.* At trial the government, over *Bourjaily's* objection, introduced taped phone conversations between his co-conspirator and a government informant. *Id.* The Court overruled *Bourjaily's* Confrontation Clause objection; upheld the admissibility of the co-conspirator's statements to the informant against *Bourjaily* per Federal Rule of Evidence 801(d)(2)(E), the co-conspirator exception; and spelled out the procedural requirements of the exception. *Id.* at 174–76. For a detailed discussion of *Bourjaily*, see 4 FISHMAN & MCKENNA, *supra* note 25, §§ 27:45–:46 at 555–64 (7th ed. 2000).

138. *Giles*, 128 S. Ct. at 2691 n.6. The Court explicitly said as much in *Crawford*, albeit in dictum. *Crawford v. Washington*, 541 U.S. 36, 56 (2002).

139. *Giles*, 128 S. Ct. at 2691 n.6. Justice Scalia acknowledged that this is an after-the-fact analysis, because, in *Bourjaily*, the Court addressed the Confrontation Clause issue in the then-applicable reliability scheme of *Ohio v. Roberts*. *Id.*

140. *Id.* Indeed, in some ways the co-conspirator exception supports, rather than undercuts, the majority approach in *Giles*. To invoke that hearsay exception against a defendant charged with conspiracy, the government must establish to the judge's satisfaction not only the existence of the conspiracy and the defendant's membership in it—facts necessary to obtain a conviction—but the government must also persuade the judge of additional facts: (1) that the declarant was also a member of the conspiracy, (2) the declarant's statement was made during the conspiracy, and (3) the declarant's statement was made in furtherance of it. See, e.g., FED. R. EVID. 801(d)(2)(E). These additional facts are not elements of the crime of conspiracy; therefore the prosecutor need not persuade the jury of these facts, nor even introduce evidence of them. Similarly, while the *Giles* majority's approach to the Confrontation Clause forfeiture rule requires a prosecutor to establish the defendant's guilt to the judge's satisfaction, it, like the co-conspirator exception, also requires the prosecutor to prove more—that is, that the defendant killed the declarant with the specific purpose of preventing the declarant from testifying against him. Here, too, the extra fact that must be proven to the judge—that the defendant's purpose was to prevent

3. Defining the Requisite Mental State: Intent to Silence

As the previous Part of this Article shows, each of the opinions that together comprise the *Giles* majority requires a showing that the defendant acted with the purpose of preventing the declarant from testifying against him. Justice Scalia's opinion in *Giles* used a number of terms to define or describe the mental state that the prosecutor must prove, including: "conduct *designed* to prevent the witness from testifying";¹⁴¹ acts done "*for the purpose* of making a witness absent";¹⁴² behavior which prevents a witness from testifying "by the defendant's *means and contrivance*";¹⁴³ conduct done or procured by a defendant "*in order to prevent* [the witness] *from giving evidence against him*";¹⁴⁴ and acts committed with "*specific intent*,"¹⁴⁵ a common-law concept that requires a prosecutor to prove not only that the defendant intended to commit a particular act, but that the defendant intended that act to have a specific result or to achieve a specific purpose.¹⁴⁶ Justice Scalia also noted that in 1997 the Court approved Federal Rule of Evidence 804(b)(6), a hearsay exception entitled "Forfeiture by wrongdoing," which requires a showing that a litigant "engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness."¹⁴⁷

the victim from testifying against him—is not an element of the crime of murder, and therefore is not something the law requires the prosecutor to prove to the jury. "[B]ecause ordinarily motive is not an element of a crime, it is not necessary for the prosecutor to prove either the presence or absence of a motive." 1 CHARLES E. TORCIA, *WHARTON'S CRIMINAL LAW* § 89 (15th ed. 1993); see also 1 BARBARA E. BERGMAN & NANCY HOLLANDER, *WHARTON'S CRIMINAL EVIDENCE* § 2:5, at 42 (15th ed. 1997); see also 2 C.J.S. *Criminal Law* § 47 (2008). But where a prosecutor has admissible evidence of a defendant's motive, he or she will offer such evidence as a matter of course. See *infra* Part IV.G.1.

141. *Giles*, 128 S. Ct. at 2683 (deriving this from his review of the common-law history of the Confrontation Clause).

142. *Id.* (citing 12 OXFORD ENGLISH DICTIONARY 559 (2d ed. 1989)).

143. *Id.* at 2684 (citing *Drayton v. Wells*, 10 S.C.L. 409, 411 (S.C. 1819); 1 JOSEPH CHITTY, *A PRACTICAL TREATISE ON THE CRIMINAL LAW* 81 (1816); S.M. PHILLIPPS, *A TREATISE ON THE LAW OF EVIDENCE* 165 (1814)).

144. *Id.* (quoting EDMUND POWELL, *THE PRACTICE OF THE LAW OF EVIDENCE* 166 (1st ed. 1858)).

145. *Id.* at 2691. Justice Scalia debunked the dissent's approach: "If the forfeiture doctrine did not admit unconfrosted prior testimony at common law, the conclusion must be, not that the forfeiture doctrine requires no specific intent in order to render unconfrosted testimony available, but that unconfrosted testimony is subject to no forfeiture doctrine at all." *Id.*

146. See, e.g., WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* § 5.2(a), at 340–41 (2d ed. 2003) (discussing the traditional views of intent).

147. *Giles*, 128 S. Ct. at 2687 (quoting FED. R. EVID. 804(b)(6)). Justice Scalia quoted approvingly an evidence treatise's statement that this language in Federal Rule of Evidence 804(b)(6) "means that the exception applies only if the defendant has in mind the particular purpose of making the witness unavailable." *Id.* (quoting 5 C. MUELLER & L. KIRKPATRICK, *FEDERAL EVIDENCE* § 8:134, at 235 (3d ed. 2007)) (citing 2 KENNETH S. BROWN, *MCCORMICK ON EVIDENCE* 176 (6th ed. 2006); 5 J. WEINSTEIN & M. BERGER, *WEINSTEIN'S FEDERAL EVIDENCE* § 804.03[7][b], at 804–32 (J. McLaughlin ed., 2d ed. 2008)). Justice Scalia further

Justice Souter, joined by Justice Ginsburg, who concurred in this aspect of Justice Scalia's opinion, expressed the same principle in terms of "*intent to prevent testimony*,"¹⁴⁸ "*intent to prevent the witness from testifying*,"¹⁴⁹ and "*some degree of intent to thwart the judicial process*."¹⁵⁰ Each of these phrases appears to say more or less the same thing. To facilitate discussion, this Article will sometimes use the phrase "*intent to silence*" to express the mental state that the plurality and concurring opinions require.¹⁵¹

4. *Part II-D-2 of Justice Scalia's Opinion*

Justice Souter, writing for himself and Justice Ginsburg, joined "all but Part II-D-2" of Justice Scalia's opinion.¹⁵² Justice Souter never explained what he found objectionable to II-D-2, and nothing in his own opinion conflicts overtly with the contents of Part II-D-2 of Justice Scalia's opinion. So what prompted Justice Souter's rejection of II-D-2?

In Part II-D-2, Justice Scalia made the following points:¹⁵³

1. Justice Scalia insisted that the purposes and objectives of the forfeiture doctrine are best served by requiring proof that the defendant killed the victim with the purpose of preventing the victim from testifying against the defendant; anything less would involve "a principle repugnant to . . . trial by jury," by requiring a judge to make a mid-trial determination of guilt.¹⁵⁴

2. Justice Scalia disparaged the dissent's efforts to provide legal precedents for its view of the forfeiture rule, because none of those precedents and analogies involve depriving a defendant "of the right to have his guilt in a criminal proceeding determined *by a jury*, and on the basis of evidence the Constitution deems reliable and admissible."¹⁵⁵

3. Justice Scalia accused the dissent of issuing a "thinly veiled invitation to overrule *Crawford* and adopt an approach not much different from the regime of *Ohio v. Roberts*, under which the Court would create the exceptions that it thinks consistent with the policies underlying the confrontation guarantee, regardless of how that guarantee was historically understood."¹⁵⁶

noted that the Davis Court described rule 804(b)(6)(a) as a "codifi[cation of] the forfeiture doctrine." *Id.* (quoting *Davis v. Washington*, 547 U.S. 813, 833 (2006)). Federal Rule of Evidence 804(b)(6) is discussed further in Part IV.G.1 of this Article, *infra*.

148. *Giles*, 128 S. Ct. at 2694 (Souter, J., concurring in part).

149. *Id.*

150. *Id.* at 2695.

151. That is, "*intent to silence*" is offered as a shorthand phrase to mean "*intent to prevent the declarant from testifying against the defendant in a pending or anticipated criminal proceeding*."

152. *Id.* at 2694 (Souter, J., concurring in part).

153. I have altered the sequence somewhat to facilitate discussion.

154. *Giles*, 128 S. Ct. at 2691 (plurality opinion).

155. *Id.* at 2692.

156. *Id.* at 2691 (citation omitted).

4. Justice Scalia also maintained that “[t]he larger problem with the dissent’s argument, however, is that the guarantee of confrontation is no guarantee at all if it is subject to whatever exceptions courts from time to time consider ‘fair.’”¹⁵⁷ Justice Scalia reiterated the basic theory underlying *Crawford v. Washington*, that is, that the Court does not have the authority to “extrapolate from the words of the Sixth Amendment to the values behind it, and then to enforce its guarantees only to the extent they serve (in the courts’ views) those underlying values”; rather, “[t]he Sixth Amendment seeks fairness indeed—but seeks it through very specific means (one of which is confrontation) that were the trial rights of Englishmen.”¹⁵⁸ The Amendment “‘does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts.’”¹⁵⁹

So which of these points did Justices Souter and Ginsburg find objectionable? Probably not points one and two, because Justice Scalia had made the same points earlier, in Part II-B of his opinion¹⁶⁰—to which Justice Souter made no objection; and Justice Souter said much the same thing in his own opinion.¹⁶¹

Points three and four can be read as doing little more than restating the rule enunciated in *Crawford*, that is, that the right to confront and cross-examine mandates a specific procedural right, for which a court cannot substitute its own notion of equivalent “fairness.”¹⁶² Given that Justices Souter and Ginsburg voted with the majority in *Crawford*,¹⁶³ *Davis*,¹⁶⁴ and *Whorton*,¹⁶⁵ it is unlikely that their rejection of II-D-2 was intended to cast doubts on the main thrust of the *Crawford* doctrine.

Professor Roger Kirst suggests that Justice Souter may have objected to Justice Scalia’s “strong rejection” in points three and four “of any role for policy in interpreting the Confrontation Clause.”¹⁶⁶ As Professor Kirst points out, Justice Souter found the historical evidence too scant to decide *Giles* solely on historical grounds,¹⁶⁷ and ultimately based his rejection of the dissent’s approach (that intent to kill should suffice) on his disapproval of the

157. *Id.* at 2692.

158. *Id.*

159. *Id.* (quoting *Crawford v. Washington*, 541 U.S. 36, 54 (2004)).

160. *See id.* at 2684–86.

161. *See id.* at 2694.

162. *See id.* at 2682, 2691–92.

163. *Crawford*, 541 U.S. at 37.

164. *Davis v. Washington*, 547 U.S. 813, 815 (2006).

165. *Whorton v. Bockting*, 127 S. Ct. 1173, 1176 (2007).

166. E-mail from Roger W. Kirst, Henry M. Grether Professor of Law, University of Nebraska-Lincoln College of Law, to Clifford S. Fishman (Sept. 16, 2008) (on file with the *Catholic University Law Review*).

167. *See Giles*, 128 S. Ct. at 2694 (Souter, J., concurring in part) (“The contrast between the Court’s and Justice Breyer’s careful examinations of the historical record tells me that the early cases on the exception were not calibrated finely enough to answer the narrow question here.”).

“circularity” of that approach¹⁶⁸—which suggests a greater willingness to consider policy in interpreting the Confrontation Clause than Justice Scalia would allow.

Or perhaps Justice Souter merely objected to something in the tone of Part II-D-2, but was too polite to specify what.

The only sure conclusion is that the absence of an explicit explanation why Justice Souter’s declination to support Part II-D-2 adds yet another level of uncertainty to the decision.

IV. APPLICATION OF THE FORFEITURE DOCTRINE IN DOMESTIC VIOLENCE AND OTHER CASES: THE INTERIM USER’S GUIDE

A. Overview

Three of the Supreme Court’s four post-*Crawford* Confrontation Clause cases involve allegations that the defendant assaulted or killed a present or former domestic partner.¹⁶⁹ Unfortunately this is no mere statistical anomaly. As Justice Breyer set out in his dissenting opinion in *Giles*:

Each year, domestic violence results in more than 1500 deaths and more than two million injuries; it accounts for a substantial portion of all homicides; it typically involves a history of repeated violence; and it is difficult to prove in court because the victim is generally reluctant or unable to testify.¹⁷⁰

The Court was well aware that *Crawford* will often make it more difficult for a prosecutor to use the complainant’s or victim’s hearsay statements at the defendant’s trial. Addressing these concerns, Justice Scalia, in *Davis*,

168. *Id.* (objecting to the “near circularity” of the dissent’s approach, which would base forfeiture solely on the judge finding the defendant guilty by a preponderance of the evidence).

169. In *Davis*, the court resolved two cases, each of which involved an assault on a present or former domestic partner. *Davis v. Washington*, 547 U.S. 813, 818–20 (2006). In *Giles*, the defendant killed his former girlfriend. *Giles*, 128 S. Ct. at 2681–82.

The fourth case, *Wharton v. Bockting*, did not involve an assault on the domestic partner; instead, the defendant was convicted of sexually molesting his wife’s six-year-old daughter. 127 S. Ct. 1173, 1177–78 (2007).

170. *Giles*, 128 S. Ct. at 2708–09 (Breyer, J., dissenting) (citing NEIL WEBSDALE, UNDERSTANDING DOMESTIC HOMICIDE 207 (1999); DEP’T OF HEALTH AND HUMAN SERVS., COSTS OF INTIMATE PARTNER VIOLENCE AGAINST WOMEN IN THE UNITED STATES 19 (2003); Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747, 751, 768–69 (2005); Bureau of Justice Statistics, Homicide Trends in the U.S., <http://www.ojp.usdoj.gov/bjs/homicide/tables/relationshipstab.htm>). According to the Department of Justice, roughly 3.5 million violent crimes were committed against family members between 1998 and 2002. Of these 3.5 million violent crimes, 49% were committed against spouses. “About 22% of murders in 2002 were family murders. Nearly 9% were murders of a spouse Females were 58% of family murder victims. Of all the murders of females in 2002, family members were responsible for 43%.” MATTHEW R. DUROSE ET AL., U.S. DEP’T OF JUSTICE, FAMILY VIOLENCE STATISTICS: INCLUDING STATISTICS ON STRANGERS AND ACQUAINTANCES 1 (2005), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fvs.pdf>.

specifically pointed to the “forfeiture by wrongdoing” rule as a way of dealing with those difficulties.¹⁷¹ Moreover, each of the three multi-Justice opinions in *Giles* discussed circumstances under which a statement by a non-testifying declarant—complainant or declarant—victim¹⁷² can, and should, be admitted over a Confrontation Clause objection.¹⁷³ The next several subparts of this Article examine how these opinions addressed the issue, and the tentative conclusions that may be drawn.

B. *Giles: Justice Scalia’s Opinion, Part II-E*

Part II-E of Justice Scalia’s opinion in *Giles* makes three main points. First, Justice Scalia insisted that the *Crawford* approach to the Confrontation Clause applies in domestic violence prosecutions, as in all other prosecutions.¹⁷⁴ Second, he emphasized that proof that the defendant acted with the intent to silence the declarant is necessary to overcome the Confrontation Clause only when the statement in question is testimonial,¹⁷⁵ and, in dictum, suggested a fairly narrow reading of what statements should be classified as testimonial.¹⁷⁶ Third, he acknowledged that the required intent (to prevent testimony) in domestic violence cases can sometimes be inferred from the charged act together with evidence of the defendant and complainant’s prior relationship.¹⁷⁷

1. *Crawford Applies in Domestic Violence Prosecutions*

Justice Scalia disparaged what he called the dissent’s suggestion that the law should ignore *Crawford* in domestic abuse cases:

Is the suggestion that we should have one Confrontation Clause (the one the Framers adopted and *Crawford* described) for all other crimes, but a special, improvised, Confrontation Clause for those crimes that are frequently directed against women? Domestic violence is an intolerable offense that legislatures may choose to combat through many means—from increasing criminal penalties to adding resources for investigation and prosecution to funding awareness and prevention campaigns. But for that serious crime, as

171. *Davis*, 547 U.S. at 833.

172. I use the phrase “declarant—complainant” because the word “victim” presupposes that the violence has occurred, which may be a contested issue at trial. In cases such as *Giles*, however, the only appropriate word is “victim”: given that defendant shot and killed her, Ms. Avie was a homicide “victim” whether or not the jury accepted Giles’s mistake-of-fact self-defense claim. See *Giles*, 128 S. Ct. at 2681.

173. See *infra* Parts IV.B–D. The prosecutor will, of course, also have to survive a hearsay objection, a subject covered in Part IV.G, *infra*.

174. *Giles*, 128 S. Ct. at 2692–93.

175. *Id.* at 2692.

176. *Id.* at 2692–93.

177. *Id.* at 2693.

for others, abridging the constitutional rights of criminal defendants is not in the State's arsenal.¹⁷⁸

This passage enjoyed a majority of at least five, and perhaps six, Justices.¹⁷⁹ But the dissent actually made no such suggestion; rather, it argued for a different approach to the forfeiture rule in all cases, not just those involving domestic violence.¹⁸⁰

2. *Dictum as to How "Testimonial" Should Be Defined*

In Part II-E of his opinion, Justice Scalia emphasized that the Confrontation Clause would at most bar "only *testimonial* statements,"¹⁸¹ and added, in dictum, that "[s]tatements to friends and neighbors about abuse and intimidation, and statements to physicians in the course of receiving treatment would be excluded, if at all, only by hearsay rules, which are free to adopt the dissent's version of forfeiture by wrongdoing."¹⁸² This dictum, if taken at its broadest, would significantly limit the definition of "testimonial" and, therefore, the effect of the Confrontation Clause—and not just in domestic abuse prosecutions.

Take Justice Scalia's first example. No doubt most "[s]tatements to friends and neighbors about abuse and intimidation"¹⁸³ are non-testimonial.¹⁸⁴ But suppose the declarant-complainant tells a friend, "D said if I try to leave him again, he'll kill me. But I just have to go! So if anything happens to me, tell that to the police!" That certainly seems to qualify as a "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact,"¹⁸⁵ which is the early nineteenth century definition of testimony that Justice Scalia cited approvingly in *Crawford*.¹⁸⁵

178. *Id.*

179. Justice Scalia, Chief Justice Roberts, and Justices Souter and Ginsburg explicitly endorsed this reasoning, as presumably did Justice Alito. See *id.* at 2694 (Alito, J., concurring) ("I join the Court's opinion . . ."). Moreover, although Justice Thomas has a much narrower view of "testimonial" than these first five Justices named in this note, he has never suggested that a different standard should apply in domestic violence cases than in other cases. The opinions of Justices Thomas and Alito are discussed in Part V, *infra*.

180. *Giles*, 128 S. Ct. at 2701, 2709 (Breyer, J., dissenting).

181. *Id.* at 2692 (majority opinion).

182. *Id.* at 2692–93.

183. *Id.* at 2692–93.

184. At present, most such statements probably do not fall within any of the traditional hearsay exceptions either; but as Justice Scalia pointed out in *Giles*, Congress or the states are free to craft a new exception, or broaden an existing exception, to include such a statement without running afoul of the Confrontation Clause, so long as the statement itself is not testimonial. See *id.* at 2686–87, 2688 n.2. See *infra* Part IV.G for a discussion of hearsay exceptions on which a prosecutor might rely.

185. *Crawford v. Washington*, 541 U.S. 36, 51 (2004) (quoting 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)); see also *supra* notes 57–58 and accompanying text.

Justice Scalia's second example—"statements to physicians in the course of receiving treatment"¹⁸⁶—also sweeps broadly enough to incorporate statements that otherwise could be considered testimonial. Suppose a woman tells her doctor: "See what my boyfriend did to me? I want you to write up every cut, every bruise, every contusion, so the prosecutor will have lots of evidence when I take the #!\$@% to trial!"¹⁸⁷ Would that not be a "solemn declaration," or, at least, a statement "that w[as] made under circumstances which would lead to an objective witness reasonably to believe that [it] would be available for use at a later trial?"¹⁸⁸

If Justice Scalia and those who joined his opinion intended the *Giles* dictum quoted at the beginning of this subsection to be taken at full face value, this suggests a very narrow definition of testimonial—one limited, perhaps, solely to statements made by, or to, the police (and 911 operators acting as their agents, as in *Davis*), and, perhaps, to other government agents and officials, but never statements made to those unaffiliated with the government. Unless and until the Court grants certiorari on a case involving arguably testimonial statements to a witness with no government affiliation, however, judges, attorneys, and scholars can only speculate on such matters.

3. *Inferring the Requisite Intent*

Third, in Part II-E of his opinion, Justice Scalia insisted that a prosecutor should often be able to satisfy the purpose-based forfeiture doctrine:

Acts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions. Where such an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution—rendering her prior statements admissible under the forfeiture doctrine. Earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify.¹⁸⁹

The first two sentences of this passage can be read broadly to suggest that evidence of a prior abusive relationship might suffice to establish that the homicidal act was committed with the intent to silence the victim. The last two

186. *Giles*, 128 S. Ct. at 2693.

187. Or picture a doctor treating a battered woman, telling her, "I am required by law to report all cases of probable domestic assault. Tell me who did this to you," in response to which, the woman then identifies her attacker.

188. *Crawford*, 541 U.S. at 51–52 (citing this as one of several possible definitions of "testimonial"); see also *supra* Part II.C.

189. *Giles*, 128 S. Ct. at 2693.

sentences of the passage, however, appear to allow the inference only in cases in which the prosecutor can prove either: (a) “[e]arlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help,” or (b) “ongoing criminal proceedings at which the victim would have been expected to testify.”¹⁹⁰

C. Giles: *The Souter-Ginsburg Concurring Opinion*

In his concurring opinion, Justice Souter, with whom Justice Ginsburg concurred, explicitly endorsed Justice Scalia’s Part II-E discussion of the operation of the Confrontation Clause in domestic violence cases,¹⁹¹ but added his own thoughts as to how the requisite intent might be shown:

[T]he element of intention would normally be satisfied by the intent inferred on the part of the domestic abuser in the classic abusive relationship, which is meant to isolate the victim from outside help, including the aid of law enforcement and the judicial process. If the evidence for admissibility shows a continuing relationship of this sort, it would make no sense to suggest that the oppressing defendant miraculously abandoned the dynamics of abuse the instant before he killed his victim, say in a fit of anger.¹⁹²

Thus, while Justice Souter, like Justice Scalia, rejected the dissent’s position (that to trigger the forfeiture rule it should suffice to show that the defendant knew his conduct would prevent the complainant–declarant from testifying), his opinion explicitly stated that intent could be inferred from such knowledge in many domestic violence cases—including, perhaps, cases in which the prosecutor lacks what Part II-E of Justice Scalia’s opinion seems to require, that is, evidence of “[e]arlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help,” or evidence that the defendant already faced criminal charges and that the victim was expected to testify against him.¹⁹³ As Parts IV.D and IV.E of this Article demonstrate, this apparently broader view actually captured a majority of the Court.

D. *The Giles Dissent*

Justice Breyer, joined by Justices Stevens and Kennedy, urged that the prosecutor should be required to prove only that the defendant knew, when he killed the victim, that doing so would prevent her from testifying in any existing or potential future court proceeding.¹⁹⁴ His dissent further argued that

190. *Id.*

191. *Id.* at 2695 (Souter, J., concurring in part). See *supra* Part IV.B.

192. *Giles*, 128 S. Ct. at 2695. Justice Souter concluded this passage, and his concurring opinion, by adding, “[t]he Court’s conclusion in Part II-E thus fits the rationale that equity requires and the historical record supports.” *Id.*

193. *Id.* at 2693 (majority opinion) (Part II-E). See *supra* Part IV.B.3.

194. *Giles*, 128 S. Ct. at 2697–98 (Breyer, J., dissenting).

if intent was required, Giles's very act of killing Ms. Avie demonstrated such intent:

[U]nder the circumstances presented by this case, there is no difficulty demonstrating the defendant's intent. This is because the defendant here knew that murdering his ex-girlfriend would keep her from testifying; and that knowledge is sufficient to show the intent that law ordinarily demands. As this Court put the matter more than a century ago: A "man who performs an act which it is known will produce a particular result is from our common experience presumed to have anticipated that result and to have intended it."¹⁹⁵

Later in the dissent, Justice Breyer described this concept as "knowledge-based intent."¹⁹⁶

Justice Scalia explicitly rejected this view, insisting that satisfying the forfeiture doctrine required more than mere knowledge from which intent could automatically be inferred.¹⁹⁷ Justice Breyer protested on the grounds that this would give the defendant an unfair evidentiary advantage: "At his murder trial, the defendant testified that he had acted in self-defense. To support that assertion, he described the victim as jealous, vindictive, aggressive, and violent."¹⁹⁸ The Court's ruling, Justice Breyer predicted, might mean that the prosecutor could not impeach this testimony with evidence that, three weeks earlier, Ms. Avie, "crying as she spoke, told a police officer how her former boyfriend (now, the defendant) had choked her, 'opened a folding knife,' and 'threatened to kill her.'"¹⁹⁹ Such a result, Justice Breyer insisted, was a grave injustice.²⁰⁰ Still, he suggested that his view had suffered no more

195. *Id.* at 2697-98 (quoting *Allen v. United States*, 164 U.S. 492, 496 (1896)) (citing *United States v. Aguilar*, 515 U.S. 593, 613 (1995) (Scalia, J., dissenting) ("[T]he jury is entitled to presume that a person intends the natural and probable consequences of his acts." (alteration in original)); *GLANVILLE WILLIAMS, CRIMINAL LAW* § 18, at 38 (2d ed. 1961) ("There is one situation where a consequence is deemed to be intended though it is not desired. This is where it is foreseen as substantially certain."); *ALI, MODEL PENAL CODE* § 2.02(2)(b)(ii) (1962) (a person acts "knowingly" if "the element involves a result of his conduct" and "he is aware that it is practically certain that his conduct will cause such a result"))).

196. *Id.* at 2708.

197. *Id.* at 2693 (majority opinion) (quoting *id.* at 2708 (Breyer, J., dissenting)) (rejecting that approach, however). Concerning the kind of evidence that might satisfy the prosecutor's burden, see *infra* Part IV.G.1.

198. *Giles*, 128 S. Ct. at 2695 (Breyer, J., dissenting).

199. *Id.* (quoting the Court's statement of the facts). The state prosecutor did introduce the victim's statement. *Id.* The Supreme Court held that, assuming (as the state conceded) that the statement was testimonial, the state could not invoke the forfeiture doctrine and introduce her statement simply by proving to the judge's satisfaction that the defendant killed her. *Id.* at 2693 (majority opinion). Instead, the Court remanded to give the state the opportunity attempt to meet the more demanding intent-to-silence standard. *Id.*

200. *Id.* at 2709 (Breyer, J., dissenting). Whether or not Ms. Avie's statements to the officer were inadmissible, the prosecutor could challenge Giles's portrayal of her in other ways. Once a homicide defendant puts a victim's character in issue, the prosecutor is entitled to offer evidence

than a nominal defeat. Referring to Part II-E of Justice Scalia's opinion, Justice Breyer observed:

Even the majority appears to recognize the problem with its "purpose" requirement, for it ends its opinion by creating a kind of presumption that will transform *purpose* into *knowledge-based intent*—at least where domestic violence is at issue; and that is the area where the problem is most likely to arise.²⁰¹

Justice Breyer then quoted and endorsed the closing paragraph of Justice Souter's concurring opinion, set forth in Part IV.C, and concluded:

This seems to say that a showing of domestic abuse is sufficient to call into play the protection of the forfeiture rule in a trial for murder of the domestic abuse victim. Doing so when, in fact, the abuser may have had other matters in mind apart from preventing the witness from testifying, is in effect not to insist upon a showing of "purpose." Consequently, I agree with this formulation, though I would apply a simple intent requirement across the board.²⁰²

E. Evaluation and Summary

To the extent that Justice Souter's concurrence differs from Justice Scalia's plurality opinion, it is Justice Souter's approach, rather than Justice Scalia's, that captured a majority of the Court on this issue.²⁰³ It is important, therefore, to focus on what Justice Souter wrote, rather than Justice Breyer's description of it, because Justice Breyer overstates matters somewhat. Under Justice Souter's view, it would not suffice for the prosecutor to show that the defendant intentionally killed his current or former wife or girlfriend.²⁰⁴ Moreover, Justice Souter's concurrence requires more than what Justice Breyer called "a showing of domestic abuse":²⁰⁵ it would not suffice to prove that the defendant had previously assaulted or threatened the victim. Rather, to establish the "inferred intent" to prevent the declarant or victim from

of the victim's non-violent, peaceful character. *See, e.g.*, FED. R. EVID. 404(a)(2). Section 1103 of the California Evidence Code is similar. *See generally* 3 FISHMAN & MCKENNA, *supra* note 25, §§ 16:47–59 at 216–38 (7th ed. 1998 & Supp. 2008).

201. *Giles*, 128 S. Ct. at 2708 (Breyer, J., dissenting). Justice Scalia's majority opinion rejected Justice Breyer's reading of Part II-E of the Court's opinion. *Id.* at 2693 (majority opinion); *see also supra* Part IV.B.

202. *Giles*, 128 S. Ct. at 2708 (Breyer, J., dissenting).

203. Justice Souter's concurring opinion was co-signed by Justice Ginsburg. *Id.* at 2694 (Souter, J., concurring in part). Justice Breyer's dissenting opinion, which embraced Justice Souter's approach, was co-signed by Justices Stevens and Kennedy. *Id.* at 2695, 2708 (Breyer, J., dissenting).

204. *See id.* at 2694–95 (Souter, J., concurring in part) (stating that to admit an uncontroverted testimonial statement on the mere showing that the defendant killed the victim-declarant would amount to near circularity and that "[e]quity demands something more . . . and more is supplied by showing intent to prevent the witness from testifying").

205. *Id.* at 2708 (Breyer, J., dissenting).

testifying, Justice Souter would require the prosecutor to establish to the judge's satisfaction that the defendant imposed on the victim or complainant "the classic abusive relationship, which is meant to isolate the victim from outside help, including the aid of law enforcement and the judicial process."²⁰⁶ What this means, and how a prosecutor may endeavor to show it, are discussed next.

F. Procedure: Means of Proof

1. Homicide Prosecutions

Requiring a prosecutor to prove to the judge that the defendant intended to prevent the declarant from testifying will not always impose an additional burden. Where, for example, the defendant is charged with killing a witness who was scheduled to testify against him in an upcoming trial, the prosecutor will offer evidence of that motive to the jury as well as to the judge.²⁰⁷ This is so because showing that the defendant had a motive to kill the victim is often useful to prove (a) that the defendant was in fact the killer,²⁰⁸ and (b) that the defendant acted with a particular mens rea (intentionally, with malice, with deliberation, *etc.*).

But where there is no direct evidence tying the killing to an already pending or potential case (as often happens in domestic homicides), establishing a testimony-preventing motive obviously imposes an additional burden on the prosecutor, will often involve evidence that a jury will not hear, and in fact may not be provable to the jury at all. This part of the Article addresses when and how this issue should be litigated.

A defendant is charged with murdering V. The prosecutor plans to offer into evidence one or more statements V made, accusing the defendant of committing prior assaults, of making threats to kill V, or acting in some other way that tends to establish the defendant's guilt.²⁰⁹ The situation could arise in connection with a variety of domestic relationships²¹⁰ and in situations

206. *Id.* at 2695 (Souter, J., concurring in part).

207. The same is true where a defendant is accused of killing someone (or having him killed) because the defendant believed the victim was cooperating with the authorities and therefore might someday testify, even though no charges were yet pending.

208. As a general rule, of course, a prosecutor in a murder trial will offer evidence of motive whenever possible, because, particularly when the identity of the perpetrator is an issue, juries are often reluctant to convict if the prosecutor cannot show the defendant had a plausible motive.

209. The following discussion presupposes that the defendant has not previously had an adequate opportunity to confront and cross-examine V about the statements. If the defendant had such an opportunity, the state could offer the prior statements under the hearsay exception for former testimony, *see* FED. R. EVID. 804(b)(1), and if those opportunities were constitutionally adequate there would be no Confrontation Clause basis to exclude them, either. *See* 4 FISHMAN & MCKENNA, *supra* note 25, § 25A:39 at 155–58 (Supp. 2008).

210. The occasional case may arise where the woman, not the man, is the abusive partner; or where an adult child is accused of abusing a dependant parent or sibling; and may arise in

unconnected to domestic matters.²¹¹ But it probably arises most often in cases where a man is accused of murdering his current or former wife or girlfriend. As that is the setting before the Supreme Court in *Giles v. California*,²¹² so that is the factual setting used for this discussion.

The defense can move to exclude such statements only if it knows the statements exist. Therefore, a defendant should seek information as to the existence and contents of such statements in its pretrial motion for discovery.²¹³

Once the defendant knows that the prosecutor contemplates offering such statements into evidence, the question arises: when should the admissibility of the statements be litigated? The parties could, of course, wait until after the trial has begun to litigate the admissibility of V's uncontroverted statements. To do so, however, might require mid-trial interruptions and could result in a mistrial if the jury has already heard evidence of such statements that the judge later concludes is inadmissible and unduly prejudicial.²¹⁴ It is far better for the attorneys to know in advance whether the statements are admissible. Such knowledge might influence the plea bargaining posture of each and, if the case does go to trial, it would affect the attorneys' trial strategies, from opening statements onward. Thus, the better practice is for either the defendant or the prosecutor to move in limine to determine the admissibility of these statements; the trial court could also raise the issue sua sponte.

Once the matter is raised, the trial judge should convene a hearing (either prior to trial or, if mid-trial, out of the jury's hearing). At this hearing, because it is the defendant who seeks to invoke the Confrontation Clause, the burden should be on the defense to establish that the statements in question are testimonial.²¹⁵ If the defense succeeds, the burden is on the prosecutor to establish that the defendant forfeited his Confrontation Clause rights by wrongdoing.²¹⁶

homosexual as well as heterosexual relationships. See Sarah M. Buel, *Effective Assistance of Counsel for Battered Women Defendants: A Normative Construct*, 26 HARV. WOMEN'S L.J. 217, 219 & nn.12-13 (2003) (noting that women often abuse men and domestic violence can occur in same-sex relationships); see also Bonnie Brandl & Deborah L. Horan, *Domestic Violence in Later Life: An Overview for Health Care Providers*, 35 WOMEN & HEALTH 41, 41 (2002) (observing that frequently an abuser is an adult child).

211. Assume, for example, V has complained to the police on several occasions that he was threatened by his next door neighbor, or by his business competitor, or by his rival for the affections of a young woman, or by an organized crime figure who demands "protection" money.

212. *Giles v. California*, 128 S. Ct. 2678, 2681-82 (2008).

213. See 5 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *FEDERAL EVIDENCE* § 8:134, at 241 (3d ed. 2007).

214. See *id.* § 8:134, at 238-39.

215. As a rule, the party seeking to invoke a rule, or an exception to a rule, has the burden of establishing that it applies to the case. See John Robert Knoebber, *Say That to My Face: Applying an Objective Approach to Determine the Meaning of Testimony in Light of Crawford v. Washington*, 51 LOY. L. REV. 497, 541 (2005) (advocating a burden-shifting approach).

216. *Id.*

At the hearing, the prosecutor should offer any available evidence that the defendant had assaulted or threatened the victim on prior occasions. This includes evidence that would not be admissible at trial.²¹⁷ Such evidence might include: (1) witnesses who observed prior arguments and threats; (2) witnesses to whom the victim made previous hearsay statements (whether testimonial or not) in which the victim recounted the defendant's various threats and acts of abuse during the course of the relationship; (3) prior instances in which the police responded to reports of domestic violence; (4) evidence of the victim's or complainant's prior injuries, such as testimony by witnesses who noticed her bruises, hospital records documenting injuries, and so on.

The prosecutor should offer any evidence tending to show that on prior occasions the defendant prevented the victim from going to the authorities, or warned her not to, or punished her for doing so. In the absence of such direct evidence, or in addition to it, the prosecutor may offer expert testimony as to the components of the "classic abusive relationship, which is meant to isolate the victim from outside help, including the aid of law enforcement and the judicial process."²¹⁸ The defense, of course, can impeach, challenge and rebut this evidence.

217. See, e.g., FED. R. EVID. 104(a) ("Questions of admissibility generally. Preliminary questions concerning . . . the admissibility of evidence shall be determined by the court In making its determination it is not bound by the rules of evidence except those with respect to privileges."). Rule 104(a) of the Uniform Rules of Evidence is substantively identical. See UNIF. R. EVID. 104(a). In *Davis v. Washington*, the Supreme Court, while carefully noting that it was not deciding matters of proof, quoted approvingly the conclusion of Massachusetts' highest court in *Commonwealth v. Edwards*, 830 N.E.2d 158, 172 (Mass. 2005), that if a hearing on forfeiture is required, "hearsay evidence, including the unavailable witness's out-of-court statements, may be considered." *Davis v. Washington*, 547 U.S. 813, 833 (2007).

218. *Giles v. California*, 128 S. Ct. 2678, 2695 (2008) (Souter, J., concurring in part). In essence, the battered woman syndrome (BWS) describes a relationship in which the man has subjected the woman to several cycles of emotional and physical abuse, as a result of which the abuse victim develops a sense of helplessness that interferes with her ability to seek help or terminate the relationship. See FISHMAN & MCKENNA, *supra* note 25, §§ 41:10–18 at 269–304 (App'x of New Chs. 2008). The admissibility of expert testimony relating to BWS first arose in cases where the allegedly battered woman was on trial for murdering the alleged batterer: defense counsel sought to use such testimony to explain to the jury why, if the relationship was as gruesome as the defendant claimed, she did not either report the deceased to the authorities or leave him. Prosecutors quickly realized that such evidence could be helpful in prosecutions of the man for battering the woman, to explain why the complainant did not immediately report the prior assaults, or why she recanted one or more complaints, or continued or returned to live with the batterer after the prior or charged assault. *Id.* § 41:10 at 270, § 41:12 at 282. Some jurisdictions exclude such evidence altogether; some permit the expert to explain the syndrome in general terms, without specifically addressing the case at hand; and some permit the expert to express an opinion as to whether the relationship in the case in fact fit within the BWS pattern. For a detailed discussion of such evidence and its admissibility at trial, see *id.* § 41:10 at 271–77 and Deborah Tuerkheimer, *Recognizing and Remedying the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959, 998–1004 (2004). Even in jurisdictions that exclude such evidence at trial, however, a judge could legitimately consider it in

At the end of the hearing, after each side rests, the judge decides whether the prosecutor has established (presumably, by a preponderance of the evidence)²¹⁹ that, as Justice Souter stated in his concurring opinion in *Giles*, the defendant and victim had “a continuing relationship of this sort.”²²⁰ If so, “it would make no sense to suggest that the oppressing defendant miraculously abandoned the dynamics of abuse the instant before he killed his victim, say in a fit of anger.”²²¹ Justice Souter’s concurring opinion, coupled with the dissent’s endorsement of it, clearly establishes that such evidence would suffice to permit the judge to infer, by a preponderance of the evidence, that when the defendant killed the victim, his purpose, at least in part, was to prevent her from complaining to the authorities and testifying against him; and therefore, that the defendant has forfeited his right to raise a Confrontation Clause objection.²²²

2. *Assault Prosecutions*

a. *Where the Complainant Refuses to Testify*

Where the complainant or victim is still alive but refuses to testify against the defendant,²²³ the same procedure, same proof, and same permissible inference of intent outlined in the previous section would apply: at a hearing, pretrial or out of the jury’s presence, the prosecutor would have to offer evidence that persuades the judge by a preponderance of the evidence that the

assessing the admissibility of other evidence. *See, e.g.*, FED. R. EVID. 104(a), discussed in note 217, *supra*.

219. The Advisory Committee Note to Federal Rule of Evidence 804(b)(6) explicitly endorses this burden of persuasion with regard to the forfeiture-by-wrongdoing hearsay exception. *See* FED. R. EVID. 804 advisory committee’s note; *infra* note 230 and accompanying text. The Supreme Court has not explicitly ruled on the prosecutor’s burden of persuasion at the hearing for Confrontation Clause purposes, but in *Davis*, it noted approvingly that lower federal and state courts, in applying the forfeiture-by-wrongdoing hearsay exception, have required the prosecutor to prove the foundational facts by a preponderance of the evidence. *Davis*, 547 U.S. at 833.

220. *Giles*, 128 S. Ct. at 2695 (Souter, J., concurring in part).

221. *Id.*

222. *Id.* at 2694–95. Keep in mind that to secure the admission of the victim’s statements at trial, the prosecutor would also have to overcome a hearsay objection, either via a forfeiture-by-wrongdoing hearsay exception or some other exception. For a brief discussion of the hearsay issue, see *infra* Part IV.G.

223. If the defendant and complainant are married, the complainant can lawfully refuse to testify by invoking the spousal testimonial privilege, which entitles one spouse to refuse to testify against the other in a criminal case. *See generally* FISHMAN & MCKENNA, *supra* note 25, § 44:2–:7 at 669–80 (App’x of New Chs. 2008). If they are not married, the complainant may simply refuse to testify even when threatened with contempt of court. Or the complainant may absent herself from the jurisdiction, effectively avoiding a subpoena to testify.

defendant engaged in misconduct with the purpose of dissuading the complainant from testifying, which in fact had that effect.²²⁴

b. Where the Complainant Testifies but Recants

Where the complainant testifies but recants (that is, testifies that the defendant did not assault her), the defendant can raise no Confrontation Clause objection: the very fact that the complainant testifies provides the defendant with the opportunity to confront and direct- or cross-examine her.²²⁵ Therefore the admissibility of her prior statements, whether testimonial or not, raise no constitutional questions; the only issues are whether the statements are admissible over a hearsay objection, either under a hearsay exception as substantive evidence, or for the limited purpose of impeaching her inconsistent trial testimony.²²⁶

G. Overcoming the Hearsay Exception

Even if the prosecutor can overcome the defendant's Confrontation Clause objection to the complainant's statements, those statements will still be excluded unless they fall within a hearsay exception.²²⁷ This Part will briefly discuss some of the exceptions most likely to apply.

1. The Forfeiture-by-Wrongdoing Exception

As originally enacted in 1975, the Federal Rules of Evidence did not include a hearsay exception incorporating the forfeiture doctrine. In 1997, however, the judicial conference and Supreme Court approved a new provision to Federal Rule of Evidence 804(b):²²⁸ "Forfeiture by wrongdoing. A statement

224. Indeed, this in essence is what occurred in *Reynolds v. United States*, 98 U.S. 145 (1879), the Court's first forfeiture-by-wrongdoing decision, where, after hearing testimony that suggested the defendant had kept his wife away from home so that she could not be subpoenaed to testify at his bigamy trial, the trial court permitted the government to introduce testimony that the defendant's wife had given at the defendant's prior trial, *id.* at 158–61.

225. If the declarant recants her accusation, the odds are that the defendant would have no interest in impeaching the declarant's recantation; but the defendant has the opportunity to question the declarant about why she made the accusation in the first place, whether the government made any promises or threats to induce her to do so, and so on.

226. Concerning prior inconsistent statements generally, see 4 FISHMAN & MCKENNA, *supra* note 25, §§ 26:2–:31 at 309–78 (7th ed. 2000 & Supp. 2008).

227. See, e.g., FED. R. EVID. 802 ("Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.").

228. Its placement in Rule 804 was logical enough. That rule sets forth hearsay exceptions that a party may use only after first establishing that the declarant is unavailable to testify, unavailability being defined in Rule 804(a):

(a) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant—

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.”²²⁹

The rule explicitly requires the offering party to prove that the adverse party acted with the intent of preventing the declarant from testifying. The Advisory Committee Note adds only that the party seeking to invoke the exception must establish its requirements by a preponderance of the evidence.²³⁰

In *Giles*, Justice Scalia suggested that the present wording of this exception “codifies” the forfeiture exception to the Confrontation Clause.²³¹ Thus, no questions exist as to its constitutionality. Other jurisdictions have enacted or promulgated similar forfeiture provisions.²³²

This hearsay exception is sound public policy, and has applications in a variety of contexts, civil and criminal, beyond domestic violence situations. Jurisdictions that have not yet enacted such a provision should do so. Because some have not, however, it is worth considering other hearsay exceptions that,

(2) persists in refusing to testify concerning the subject matter of the declarant’s statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of the declarant’s statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of statement has been unable to procure the declarant’s attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant’s attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

FED. R. EVID. 804(a).

229. FED. R. EVID. 804(b)(6). Note that this exception applies in civil as well as criminal cases.

230. FED. R. EVID. 804 advisory committee’s note. In 1997, Rule 804(b)(6), a provision identical to the federal rule, was added to the Uniform Rules of Evidence. The Uniform Rules of Evidence were amended in 1974 by the National Conference of Commissioners on Uniform State Laws as a state-court code of evidence similar to the Federal Rules of Evidence, which were adopted in 1975. See Eileen A. Scallen, *Proceeding with Caution: Making and Amending the Federal Rules of Evidence*, 36 SW. U. L. REV. 601, 605 (2008).

231. See *supra* note 147 and accompanying text.

232. Since 1997, twelve states have added a corresponding provision to their own evidence codes. See CAL. EVID. CODE § 1350 (West 2009); DEL. R. EVID. 804(b)(6); HAW. R. EVID. 804(b)(7); KY. R. EVID. 804(b)(5); MD. CODE ANN., EVID. § 5-804(b)(5) (LexisNexis 2008); MICH. R. EVID. 804(b)(6); N.D. R. EVID. 804(b)(6); OHIO R. EVID. 804(b)(6); OR. REV. STAT. ANN. § 40.465 (West Supp. 2008); 42 PA. CONS. STAT. ANN. § 804(B)(6) (West 1999); TENN. R. EVID. 804(b)(6); VT. R. EVID. 804(b)(6). At least eleven others have adopted the exception through case law. See Anthony Bocchino & David Sonenshein, *Rule 804(b)(6)—The Illegitimate Child of the Failed Liaison Between the Hearsay Rule and Confrontation Clause*, 73 MO. L. REV. 41, 79–80 (2008).

under appropriate circumstances, would secure admissibility of the declarant's statements over a hearsay objection.

2. *Excited Utterance*

The excited utterance hearsay exception, found at Federal Rule of Evidence 803(2) and many corresponding state provisions,²³³ provides: "The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . . (2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."²³⁴

To qualify a statement for admission under this exception, the offering party need not show that the declarant is unavailable, nor call the declarant as a witness,²³⁵ but must satisfy the judge of the following facts²³⁶ by a preponderance of the evidence:

1. The declarant witnessed or experienced a "startling event or condition."²³⁷
2. The statement "relat[es] to" the event or condition.²³⁸
3. The event or condition caused the declarant "stress" and "excitement."²³⁹
4. "[T]he declarant's condition at the time was such that the statement was spontaneous, excited or impulsive rather than the product of reflection and deliberation."²⁴⁰

In domestic violence cases, the first three requirements will generally cause little difficulty: being assaulted or threatened clearly qualifies as "a startling event or condition" that will cause "stress" and "excitement," and the

233. See 4 FISHMAN & MCKENNA, *supra* note 25, §§ 28:10–11 at 624–29 (7th ed. 2000), for a discussion of how each state treats such statements.

234. FED. R. EVID. 803(2).

235. Rule 803 of the Federal Rules of Evidence is entitled "Hearsay Exceptions; Availability of the Declarant Immaterial," and the rule's introductory sentence repeats this. Normally, of course, to satisfy the Confrontation Clause, the prosecutor must, among other things, either call the declarant as a witness or establish the declarant's unavailability. See *Crawford v. Washington*, 541 U.S. 36, 42–45 (2004). But if the prosecutor can satisfy the forfeiture doctrine, the defendant is not entitled to make a Confrontation Clause objection. See *supra* Part II.D.

236. See 4 FISHMAN & MCKENNA, *supra* note 25, § 28:9 at 621–22 (7th ed. 2000 & Supp. 2008).

237. FED. R. EVID. 803(2).

238. *Id.*

239. *Id.*

240. *Dike v. State*, 990 P.3d 1012, 1021 (Wyo. 1999) (internal quotation marks omitted) (quoting *LP v. Natrona County Dep't of Pub. Assistance & Social Servs.*, 679 P.2d 976, 1003 (Wyo. 1984)); see also *Luedemann v. Wade*, 913 S.W.2d 773, 775 (Ark. 1996); *People v. Farmer*, 765 P.2d 940, 948–49 (Cal. 1989); *Reyes-Contreras v. United States*, 719 A.2d 503, 506 (D.C. 1998); *Walthour v. State*, 497 S.E.2d 799, 801 (Ga. 1998); *People v. Thomas*, 687 N.E.2d 892, 902 (Ill. 1997); *Commonwealth v. Whelton*, 696 N.E.2d 540, 544 (Mass. 1998); *State v. Post*, 901 S.W.2d 231, 234 (Mo. Ct. App. 1995); *People v. Vasquez*, 670 N.E.2d 1328, 1334 (N.Y. 1996); *State v. Duncan*, 373 N.E.2d 1234, 1237 (Ohio 1978); *State v. Smith*, 857 S.W.2d 1, 9 (Tenn. 1993).

statement usually identifies the defendant as the assailant, which “relates” to the assault or threat.²⁴¹ The fourth requirement will often pose problems depending on a variety of factors, the main ones being the amount of time that elapsed between the assault and the declarant’s statement;²⁴² whether the jurisdiction in question takes a narrow or expansive view of how much or how little time it would likely take before the declarant regained her ability to reflect and deliberate;²⁴³ whether, if the statement was made in response to a question, it is nevertheless spontaneous enough;²⁴⁴ and, in some jurisdictions, whether the statement is self-serving or the declarant had a motive to lie.²⁴⁵

3. *Prior Inconsistent Statements*

When a witness testifies to a certain fact or version of events, the adverse party is permitted to impeach that testimony by introducing evidence that the witness had previously made statements that are inconsistent with the testimony.²⁴⁶ Thus, in a domestic violence prosecution, if the complainant recants her original allegations against the defendant when she testifies at trial, the prosecutor is permitted to cross-examine her about her prior statements accusing the defendant of assault, and if she denies having made those statements, can elicit testimony about her statements from the police officer or other person to whom she made them.²⁴⁷ But if the prior statement is admitted only to impeach the trial testimony, the trial judge, if requested by the defendant, must instruct the jury that it cannot consider the statement as evidence of the defendant’s guilt, but can only use it to evaluate the weight it should give to the erstwhile complainant’s exculpatory evidence at trial.²⁴⁸

Of greater import is that, if the statement is admitted only to impeach the complainant’s trial testimony, the judge is not permitted to consider it when ruling on the defendant’s motion for a directed verdict at the close of the

241. See 4 FISHMAN & MCKENNA, *supra* note 25, § 28:12 at 629–34 (7th ed. & Supp. 2008).

242. 4 *id.* § 28:14, at 638–39.

243. See, for example, *United States v. Arnold*, 410 F.3d 895 (6th Cir. 2005), *State v. Branch*, 865 A.2d 673, 685 (N.J. 2005), and *State v. Cotto*, 865 A.2d 660, 668 (N.J. 2005), each requiring the state to establish the time period and imposing fairly strict limits—measured in seconds or, at the most, a few minutes.

244. That a statement was made in response to a question weighs against the statement’s spontaneity, although it is not necessarily a disqualifying factor. See 4 FISHMAN & MCKENNA, *supra* note 25, § 28:18 at 649 (7th ed. & Supp. 2008).

245. 4 *id.* § 28:13, at 636–38.

246. See, e.g., FED. R. EVID. 613. Impeachment of this kind poses an impressively complex variety of procedural and tactical issues. See 4 FISHMAN & MCKENNA, *supra* note 25, §§ 26:10–:29 at 335–74 (7th ed. & Supp. 2008).

247. See 4 FISHMAN & MCKENNA, *supra* note 25, §§ 26:17–:25 at 345–63 (7th ed. 2000 & Supp. 2008).

248. See 4 *id.* § 26:26, at 363.

state's case and after both sides rest.²⁴⁹ If the prosecutor lacks other credible evidence that the defendant assaulted the complainant, the judge must grant the motion and dismiss the case.²⁵⁰

Many jurisdictions have created a hearsay exception that admits some prior inconsistent statements as substantive evidence.²⁵¹ That is, the exception permits the statement to be used not merely to impeach the witness's trial testimony, but also as evidence of the facts asserted in the statement. If the prior statement falls within such an exception, the judge may consider it in ruling on the defendant's motion for a directed verdict. Moreover, the judge need not give a limiting instruction to the jury.²⁵²

Some states follow the model of Federal Rule 801(d)(1)(B) and allow substantive use of a prior inconsistent statement only if that prior statement was made under oath at a formal proceeding of some kind, such as a preliminary hearing or before a grand jury.²⁵³ Other states permit a wider range of prior inconsistent statements to be used as substantive evidence.²⁵⁴

4. Other Specialized Exceptions: California Evidence Code Section 1370

Some states have enacted special hearsay exceptions for statements relating to domestic violence, child molestation, sexual assault, and similar abuses.²⁵⁵ A detailed discussion of all such exceptions is beyond the scope of this Article. It is, however, worthwhile to consider the California exception on which the prosecutor relied in *Giles*.

Ms. Avie's statement to Officer Kotsinadelis was admitted at Giles's California trial pursuant to California Evidence Code Section 1370:

(a) Evidence of a statement by a declarant is not made inadmissible by the hearsay rule if all of the following conditions are met:

249. As a matter of routine, defense counsel should move for a directed verdict (also sometimes called a motion for a judgment of acquittal) at those two stages in a criminal trial. The trial judge must view the evidence in a light most favorable to the prosecutor and assess whether a rational jury could find the defendant guilty beyond a reasonable doubt. If the judge concludes that a rational jury could convict, the defendant's motion is denied, and the case proceeds to the next stage. See generally 1 FISHMAN & MCKENNA, *supra* note 25, §§ 5:14–:17 at 446–52 (7th ed. 1992 & Supp. 2008).

250. See 1 *id.* § 5:15, at 447–48 & n.86 (7th ed. 1992).

251. See 4 *id.* §§ 26:4–:6, at 312–31 (7th ed. 2000 & Supp. 2008).

252. See 4 *id.* § 26:26, at 363–64.

253. See 4 *id.* §§ 26:3–:4, at 311–24.

254. See 4 *id.* §§ 26:30–:32, at 375–79. The federal approach is unfortunate: it gives an unfair advantage to the litigant who can threaten, bribe, or seduce a witness into recanting. Permitting a witness-declarant's prior inconsistent statement to be used substantively and not merely to impeach substantially undoes this unfair advantage and permits the jury to decide whether it finds the witness's testimony, or her prior statement, more likely to be truthful.

255. See 4 *id.* §§ 31:1–:8, at 757–77.

(1) The statement purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant.

(2) The declarant is unavailable as a witness pursuant to Section 240.

(3) The statement was made at or near the time of the infliction or threat of physical injury. Evidence of statements made more than five years before the filing of the current action or proceeding shall be inadmissible under this section.

(4) The statement was made under circumstances that would indicate its trustworthiness.

(5) The statement was made in writing, was electronically recorded, or made to a physician, nurse, paramedic, or to a law enforcement official.

(b) For purposes of paragraph (4) of subdivision (a), circumstances relevant to the issue of trustworthiness include, but are not limited to, the following:

(1) Whether the statement was made in contemplation of pending or anticipated litigation in which the declarant was interested.

(2) Whether the declarant has a bias or motive for fabricating the statement, and the extent of any bias or motive.

(3) Whether the statement is corroborated by evidence other than statements that are admissible only pursuant to this section.

(c) A statement is admissible pursuant to this section only if the proponent of the statement makes known to the adverse party the intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings in order to provide the adverse party with a fair opportunity to prepare to meet the statement.²⁵⁶

It is worthwhile to compare this rule with Federal Rule of Evidence 804(b)(6), which it resembles in some respects. First, the declarant must be unavailable.²⁵⁷ Second, that unavailability must have been caused by the defendant's wrongdoing.²⁵⁸ The California rule is less demanding than its federal counterpart, however, in that it does not require proof that the adverse party engaged in wrongdoing with the purpose of preventing the declarant from testifying. On the other hand, it incorporates several restrictions that the federal rule does not. First, only statements that "purport[] to narrate, describe or explain the infliction or threat of physical injury upon the declarant," satisfy

256. CAL. EVID. CODE § 1370 (West 2009).

257. California Evidence Code Section 240, incorporated by reference into Section 1370(a)(2), defines "unavailable" in terms substantively identical to Federal Rule of Evidence 804(a). *See id.* § 240.

258. *Id.* § 240(b).

the exception.²⁵⁹ Second, the statement must have been made “at or near the time of the infliction or threat of physical injury.”²⁶⁰ Third, it must have been made “under circumstances that would indicate its trustworthiness.”²⁶¹ Fourth, it seeks to ensure that the jury will hear an accurate version of the declarant’s statement by requiring that the statement was either preserved electronically or in writing, or made to specified witnesses.²⁶² Fifth, the offering party must give the adverse party pretrial notice of its intention to offer a statement under the provision.²⁶³ None of the reported state opinions in the case even raised the question of whether these additional requirements might be an adequate substitute for Giles’s right to cross-examine the declarant, because *Crawford* foreclosed—or at least appeared to foreclose—such an argument when it rejected *Roberts*.²⁶⁴

V. GILES AND THE DEFINITION OF “TESTIMONIAL”

In *Giles*, the state conceded on appeal that Ms. Avie’s statement to the police, accusing Giles of assaulting and threatening her, was testimonial.²⁶⁵ Thus, the Supreme Court did not formally address whether it was testimonial or not. Nevertheless it is possible to read the opinions in the case as suggesting that anywhere from one to five of the Justices might be willing to revisit how the Confrontation Clause should be applied to police questioning of witnesses, or, at least, of domestic assault complainants. Moreover, Justice Scalia’s plurality opinion includes dicta which, if applied literally, may define “testimonial” much more narrowly than first suggested in *Crawford*.²⁶⁶ Thus, the decision may have created more uncertainty about the scope of the Confrontation Clause than it has resolved.

259. *Id.* § 1370(a)(1). This is because, unlike the federal rule, which by its terms applies generally to criminal and civil trials, the California rule is applicable only in cases involving the infliction or threat of physical injury.

260. *Id.* § 1370(a)(3).

261. *Id.* § 1370(a)(4). Some factors to be considered in assessing trustworthiness are set forth in Section 1370(b).

262. *Id.* § 1370(a)(5).

263. *Id.* § 1370(c).

264. See *Crawford v. Washington*, 54 U.S. 36, 63–68 (2003).

265. *Giles v. California*, 128 S. Ct. 2678, 2682 (2008). Although in hindsight this may have been a mistake, one cannot blame the prosecutor for making this concession, because the facts in *Giles* appear indistinguishable (for Confrontation Clause purposes) from those in the *Hammon* case, which the Court, by an eight-to-one vote in *Davis*, classified as testimonial. Justice Thomas rejected that conclusion. See *Davis v. Washington*, 547 U.S. 813, 834 (2006) (Thomas, J., dissenting from the result in *Hammon*). The facts in *Hammon*, and a comparison of those facts to the facts in *Davis*, are found in Part II.E, *supra*.

266. See *supra* notes 181–82 and accompanying text.

A. *The Five Opinions in Giles*

Four of the five opinions in *Giles* expressed or implied a willingness to reconsider, or at least narrow, the definition of testimonial.²⁶⁷ Starting with the most unequivocal, they can be summarized as follows:

1. Justice Thomas concurred in the result in *Giles* only because the state conceded that Ms. Avie's statement was testimonial, but adhered to his previously stated position that only actual testimony and statements elicited during formal, *Mirandized* police interrogation, were testimonial.²⁶⁸ Justice Thomas wrote:

The contested evidence is indistinguishable from the statements made during police questioning in response to the report of domestic violence in *Hammon v. Indiana*, decided with *Davis v. Washington*. There, as here, the police questioning was not "a formalized dialogue"; it was not "sufficiently formal to resemble the Marian examinations" because "the statements were neither *Mirandized* nor custodial, nor accompanied by any similar indicia of formality"; and "there is no suggestion that the prosecution attempted to offer [Ms. Avie's] hearsay evidence at trial in order to evade confrontation."²⁶⁹

Justice Thomas thus provided a fifth vote to vacate *Giles*'s conviction and remand for further proceedings, but provided that fifth vote supporting Justice Scalia's approach to the forfeiture rule only in the most technical sense; should a similar case arise, a prosecutor probably could win Justice Thomas's vote in favor of the admissibility of the victim's statement simply by refusing to concede that the statement was testimonial, which (in Justice Thomas's view) would moot the issue of the intent or purpose with which the defendant killed his victim.²⁷⁰

2. Justice Alito, who had raised no objections to the Court's opinion in *Davis*, suggested that he may now be willing to reconsider how that case defined testimonial. His concurring opinion in *Giles* reads, in its entirety, as follows:

I join the Court's opinion, but I write separately to make clear that, like Justice Thomas, I am not convinced that the out-of-court statement at issue here fell within the Confrontation Clause in the first place. The dissent's displeasure with the result in this case is understandable, but I suggest that the real problem concerns the scope of the confrontation right. The Confrontation Clause does not apply to out-of-court statements unless it can be said that they are the

267. Only Justice Souter's concurring opinion contains no direct or indirect reference to the definition of testimonial. See *Giles*, 128 S. Ct. at 2694–95 (Souter, J., concurring in part).

268. *Id.* at 2693 (Thomas, J., concurring).

269. *Id.* at 2693 (alteration in original) (citations omitted) (quoting *Davis v. Washington*, 547 U.S. 813, 840 (2006)).

270. See *id.* at 2693–94.

equivalent of statements made at trial by “witnesses.” It is not at all clear that Ms. Avie’s statement falls within that category. But the question whether Ms. Avie’s statement falls within the scope of the Clause is not before us, and assuming for the sake of argument that the statement falls within the Clause, I agree with the Court’s analysis of the doctrine of forfeiture by wrongdoing.²⁷¹

This can be read several ways. The narrowest reading is that the facts in *Giles* differ in some significant way (that do not appear in any published court opinion) from those in *Hammon*, which might make the statements in *Giles* non-testimonial, without affecting the continued validity of *Hammon–Davis*. But Justice Alito makes no such suggestion that this is the case.²⁷² Moreover, Justice Thomas, with whom Justice Alito explicitly (if tentatively) aligned himself, wrote in his own *Giles* concurrence that “[t]he contested evidence is indistinguishable from the statements made during police questioning in response to the report of domestic violence in *Hammon v. Indiana*, decided with *Davis v. Washington*.”²⁷³ The most natural reading of Justice Alito’s concurrence, therefore, is that he entertains serious second thoughts about whether statements to the police such as those in *Giles* and *Hammon* are testimonial.

Thus, Justice Alito’s vote lends only lukewarm support²⁷⁴ for Justice Scalia’s conclusion that the prosecutor must show that it was the defendant’s “design[] to prevent” the declarant from testifying,²⁷⁵ because if a prosecutor in a similar case contested whether the statement was testimonial, she might win Justice Alito’s vote on that issue, as well as Justice Thomas’s.

3. Early in his dissent, Justice Breyer, joined by Justices Stevens and Kennedy, emphasized: “It is important to underscore that this case is premised on the assumption, not challenged here, that the witness’ statements are testimonial for purposes of the Confrontation Clause”²⁷⁶—language that at least hints at dissatisfaction with the current definition of “testimonial.” Thus, if the Court grants certiorari on a similar case, it is possible that the dissenters in *Giles* might combine with Justices Thomas and Alito to significantly narrow the definition of what constitutes testimonial statements to the police.

271. *Id.* at 2694 (Alito, J., concurring) (citation omitted).

272. Justice Alito is of course under no obligation to discuss such a factual distinction between *Hammon* and *Giles*, because the state did not contest the testimonial nature of Ms. Avie’s statement. *Id.* at 2682 (majority opinion). The absence of such an indication, however, logically suggests that factual distinctions are not what drove Justice Alito to write his opinion.

273. *Id.* at 2693 (Thomas, J., concurring).

274. Justice Alito’s support for the Scalia plurality opinion is lukewarm because if Ms. Avie’s statement and others like it are not classified as testimonial, as a practical matter, a prosecutor will need to rely on the forfeiture doctrine to overcome a Confrontation Clause objection in far fewer cases.

275. *Id.* at 2683 (majority opinion).

276. *Id.* at 2695 (Breyer, J., dissenting).

4. Dictum in Part II-E of Justice Scalia's majority opinion also suggests a narrowing of that definition, albeit not with regard to statements to the police.²⁷⁷

B. Part II-E of Justice Scalia's Opinion

In *Crawford v. Washington*, Justice Scalia, writing for a seven-Justice majority, stated: "An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not."²⁷⁸ This of course prompts the question: suppose a person who becomes the defendant's "accuser" makes a "remark to an acquaintance" that is not a "formal statement," but is not all that "casual," either? Is that "remark" testimonial? The Supreme Court has not yet considered such a case, but Justice Scalia offered dictum about this situation in *Giles*.

In Part II-E of his opinion in *Giles*, Justice Scalia acknowledged that the decision might make it more difficult to prosecute domestic violence prosecutions, but emphasized that the Confrontation Clause would at most bar "only *testimonial* statements,"²⁷⁹ and added, in dictum, "[s]tatements to friends and neighbors about abuse and intimidation, and statements to physicians in the course of receiving treatment would be excluded, if at all, only by hearsay rules, which are free to adopt the dissent's version of forfeiture by wrongdoing."²⁸⁰ This dictum, if taken at its broadest, would significantly limit the definition of testimonial and therefore the impact of the Confrontation Clause, and not just in domestic abuse prosecutions.

1. Statements to Friends and Neighbors

No doubt *most* "[s]tatements to friends and neighbors about abuse and intimidation"²⁸¹ are non-testimonial,²⁸² and most lower courts have so held.²⁸³

277. *Id.* at 2692–93 (majority opinion).

278. *Crawford v. Washington*, 541 U.S. 36, 51 (2004).

279. *Giles*, 128 S. Ct. at 2692.

280. *Id.* at 2692–93.

281. *Id.* at 2692–93.

282. At present most such statements probably do not fall within any of the traditional hearsay exceptions, but as Justice Scalia pointed out in *Giles*, Congress, or a state, is free to craft a new exception (or broaden an existing exception) to include such a statement without running afoul of the Confrontation Clause, so long as the statement itself is not testimonial. *See id.* at 2687–88 & n.2. A number of states have in fact created such exceptions, including, for example, California Evidence Code Section 1350. A number of states have created hearsay exceptions in sexual assault and child abuse cases. *See supra* note 255 and accompanying text.

283. *See People v. Vigil*, 127 P.3d 916, 927–28 (Colo. 2006) (holding that statements by a sexually abused child to his father and his father's friend were non-testimonial because the statements were not solemn or formal statements made to a governmental actor); *State v. Rivera*, 844 A.2d 191, 201–02 (Conn. 2004) (holding that declarant's statements to his nephew were outside the core category of testimonial statements of concern in *Crawford* because he made the

But suppose the declarant-complainant tells a friend, “D said if I try to leave him again, he’ll kill me. But I just have to get away from him! So if anything happens to me, tell that to the police!” That certainly seems to qualify as a “solemn declaration or affirmation made for the purpose of establishing or proving some fact,” the early nineteenth century definition of “testimony” that Justice Scalia cited approvingly in *Crawford*.²⁸⁴ At least one state court has held that a statement of this nature is, in fact, testimonial.²⁸⁵ This result is

“statement in confidence and on his own initiative to a close family member, almost eighteen months before the defendant was arrested and more than four years before his own arrest”); *Demons v. State*, 595 S.E.2d 76, 80 (Ga. 2004) (holding that decedent’s statements to a co-worker about the source of bruises on his upper arms and chest and about a threat made by the defendant “were not remotely similar to such prior testimony or police interrogation, as they were made in a conversation with a friend, before the commission of any crime, and without any reasonable expectation that they would be used at a later trial”); *State v. Blackstock*, 598 S.E.2d 412, 420 (N.C. Ct. App. 2004) (holding that statements by the victim of an armed robbery to his wife and daughter were not testimonial because they were not made under a reasonable belief that they would be used prosecutorially (the victim made the statements when his health was improving, but he died later)). There are several federal cases that also use the same reasoning. See, e.g., *United States v. Lee*, 374 F.3d 637, 645 (8th Cir. 2004) (holding that statements made by co-defendant to his mother were non-testimonial because they were casual conversations that did not implicate the core concerns of the Confrontation Clause and were admissible against defendant because they were co-conspirator statements made in furtherance of criminal activity); *Evans v. Luebbers*, 371 F.3d 438, 444–45 (8th Cir. 2004) (holding that numerous statements made to ten different witnesses by defendant’s estranged wife, who was later murdered, that she was scared of defendant, that defendant had verbally and physically abused her, that she intended to divorce defendant, and that she obtained a protective order against defendant, were not testimonial because the statements did not fit within the expressed definitions of testimonial set out by *Crawford*); *Horton v. Allen*, 370 F.3d 75, 84 (1st Cir. 2004) (holding that such statements were not testimonial because they were not ex parte testimony or its equivalent; were not contained in formalized documents; were not made during custodial confession; and were made to a private person and not under circumstances that would lead an objective witness to believe that the statements would be available for use a later trial).

Court treatment of statements by a child sexual assault victim fall into a straightforward pattern. Statements to a parent or other relative or guardian, made before the authorities were notified, are classified as non-testimonial; statements to police officers or child advocates or others acting in an official or semi-official capacity are generally classified as testimonial. See, e.g., *In re Rolandis G.*, No. 99581, 2008 WL 4943446, at *9–10 (Ill. Nov. 20, 2008) (statements by child victim to a child advocate during interview were testimonial in nature, and admission of statements violated the respondent juvenile’s Sixth Amendment right of confrontation). But see *People v. Geno*, 683 N.W.2d 687, 692 (Mich. Ct. App. 2004) (finding that a child sexual assault victim’s statement taken during an interview conducted at the Children’s Assessment Center was non-testimonial because the interviewer was “not . . . a government employee”). For further discussion of this issue, see 4 FISHMAN & MCKENNA, *supra* note 25, § 28:20 at 652–53 (7th ed. 2000 & Supp. 2008).

284. *Crawford v. Washington*, 541 U.S. 36, 51 (2004).

285. *State v. Sanchez*, 177 P.3d 444, 450 (Mont. 2008) (holding that a note written before the declarant’s murder was a testimonial statement, and its admission was harmless). Fifteen days before defendant shot her to death, his girlfriend wrote a note, “To whom it concerns,” relating that Raul Sanchez

consistent with how the Court defined testimonial in *Crawford*, but is arguably inconsistent with the Court's dictum in *Giles*.

2. *Statements to Physicians in the Course of Receiving Treatment*

Justice Scalia's second example in his *Giles* dictum of a non-testimonial statement—"statements to physicians in the course of receiving treatment"²⁸⁶—also sweeps broadly enough to incorporate statements that could be otherwise be considered testimonial. Suppose a woman tells her doctor: "See what my boyfriend did to me? I want you to write up every cut, every bruise, every contusion, so the prosecutor will have lots of evidence when I take the #!\$@% to trial!"²⁸⁷ This would seem to qualify as a "solemn declaration,"²⁸⁸ or (to quote a potential definition of "testimonial" that Justice Scalia in *Crawford* cited without endorsing), as a statement "that was made under circumstances which would lead to an objective witness reasonably to believe that the statement would be available for use at a later trial."²⁸⁹

3. *Implications in Non-Domestic Abuse Prosecutions*

If Justice Scalia and those who joined his opinion intended the *Giles* dicta to be taken at full face value, this suggests a very narrow definition of "testimonial" in any criminal case—a definition limited, perhaps, solely to statements made by, or to, the police (and 911 operators acting as their agents, as in *Davis*), and, perhaps, to other government agents and officials, but which would never include statements made to those unaffiliated with the government. This would have broad implications in cases unrelated to domestic violence.

Consider: A man named V is shot and killed. F, V's friend tells the police: "Two weeks ago, V told me that he and D went partners on a drug deal, but the cops showed up and V had to flush the stuff, and D was threatening to kill V unless V paid him for the drugs. V told me if anything happened to him, I

told me if I ever was caught [sic] with another man while I was dating him, that he would kill me. Raul told me he had friends in Mexico that had medicine that would kill me and our doctors wouldn't know what it was till it was to [sic] late and I would be dead. So if I unexspetly [sic] become sick and on the edge of death, and perhaps I die no [sic] you will have some answers.

Id. at 447. See also Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1041 (1998) (arguing that where the "declarant not only anticipated but desired that her statement be used testimonially, and she used her listener as an intermediary between her and the authorities, . . . the statement should clearly be deemed testimonial").

286. *Giles*, 128 S. Ct. at 2693.

287. Or picture a doctor treating a battered woman, telling her, "I am required by law to report all cases of probable domestic assault; tell me who did this to you," in response to which the woman then identifies her attacker.

288. *Crawford*, 541 U.S. at 51.

289. In *Crawford*, 541 U.S. at 52, the Court cited this as one of several possible definitions of "testimonial." See *supra* Part V.A.

should tell the police.” At D’s trial for murder, the prosecutor calls F as a witness and seeks to have F repeat what V allegedly told him.

Even a more formal statement might be classified as non-testimonial. Suppose a corporate officer uncovers evidence of embezzlement or fraud and confronts employee X with that evidence. X tearfully asks if the matter might be quietly disposed of if he resigns and pays the money back over time. The supervisor says, “No, I’m afraid I have to report this to our attorneys and, frankly, they’ll probably insist on going to the police.” X nevertheless confesses—and gives a detailed explanation as to how he and co-employee Y committed the crime. X and Y are indicted. At their trial, the prosecutor seeks to have the supervisor repeat X’s entire statement—including his incrimination of Y.

In each of these scenarios, the declarant either intended, or was bluntly informed, that his statement would be used prosecutorially. If Justice Scalia’s dicta become law, D and Y’s Confrontation Clause objections will nevertheless be overruled. Each statement, moreover, might well fall within Federal Rule of Evidence 804(b)(3),²⁹⁰ and therefore be admissible to convict D of murdering V and to convict Y of embezzling funds—without either defendant having the opportunity to confront and cross-examine his accuser.

Unless the Court grants certiorari on a case involving arguably testimonial statements to a witness with no government affiliation, these uncertainties will give evidence scholars much to speculate and hypothesize about, which, of course, is a good thing—for evidence scholars and the law reviews that publish their articles. Judges and attorneys, on the other hand, will flounder and grope for answers, hoping they guess right.

VI. CONCLUSION

Prior to the *Giles* decision, several things about the post-*Crawford* Confrontation Clause seemed clear. It applied only to “testimonial” statements.²⁹¹ Although the Court had not yet provided a comprehensive definition of “testimonial,” that term included, for certain, actual testimony and other sworn statements,²⁹² and statements elicited during “Mirandized” custodial interrogation.²⁹³ The Court had also provided a workable approach to classifying statements made to police officers and 911-operators as a crime was being reported and during the initial investigation of it: statements made (even in response to official questioning) that related to an ongoing emergency

290. FED. R. EVID. 804(b)(3) (providing that a statement made against the declarant’s interest may be admitted over a hearsay objection).

291. *Whorton v. Bockting*, 127 S. Ct. 1173, 1179 (2007); *Davis v. Washington*, 547 U.S. 813, 823–24 (2006).

292. *Crawford*, 541 U.S. at 51–52.

293. *Id.*

were not testimonial;²⁹⁴ once the emphasis switched to past events, however, such statements—whether elicited by questioning or not—would be testimonial.²⁹⁵ It was also quite clear that the forfeiture doctrine (that is, that a defendant forfeited his right to raise a Confrontation Clause objection if his wrongdoing prevented the declarant from testifying) was a firmly embedded exception to the Confrontation Clause,²⁹⁶ although there was uncertainty as to what the prosecutor had to prove about the defendant's mental state or intent with regard to the declarant's unavailability.

Despite the fractured nature of the decision in *Giles v. California*, the Court has provided an answer to that latter question which, though inevitably fuzzy at the margins, is clear in its essence: to establish that a defendant forfeited his right to make a Confrontation Clause objection to hearsay evidence, a prosecutor must establish that "the defendant engaged in conduct designed to prevent the witness from testifying."²⁹⁷ But this rule won only a tentative and uncertain majority of the Justices;²⁹⁸ and the governing statement of what the prosecutor must show, as well as specific suggestions as to how that might be accomplished, emerge, not from Justice Scalia's opinion for the Court, but from a concurring opinion signed by two Justices and lukewarm support for the concurrence by three dissenting Justices.²⁹⁹

Giles leaves several other Confrontation Clause issues unsettled. Although that case dealt with (and causes problems for the prosecution in) the application of the Confrontation Clause in domestic violence prosecutions, it has implications in other types of cases as well.³⁰⁰ Moreover, it did not address other troubling issues about the application of the Confrontation Clause in domestic violence cases.

Somewhat more disturbing is that the five opinions submitted by the Justices suggest that the firm consensus most observers thought existed, as to when statements in response to official questioning are "testimonial," may not be so firm after all. Two concurring Justices stated a strong inclination to revisit that issue,³⁰¹ and three dissenting Justices at least hinted at a willingness to do so.³⁰² Justice Scalia's opinion for the Court, moreover, includes broad, sweeping dicta that would categorically exclude from "testimonial," many statements that might otherwise fall within the definitions of that term provided, or suggested, in *Crawford*.³⁰³

294. See *supra* Part II.E.3.

295. See *supra* Part II.E.3.

296. See *supra* Part II.E.4.

297. *Giles v. California*, 128 S. Ct. 2678, 2680 (2008).

298. See *supra* Part III.B.1.

299. See *supra* Part V.A.

300. See *supra* Part V.B.

301. See *supra* Part V.A (noting the opinions of Justices Thomas and Alito).

302. See *supra* Part V.A (discussing Justice Breyer's dissent).

303. See *supra* Part IV.B.2.

Giles thus provides only an uncertain answer to the question it explicitly addressed, while raising additional uncertainties on broader and more fundamental aspects of the post-*Crawford* Confrontation Clause. Such uncertainties are probably inevitable when, as it did in *Crawford*, the Court decides to throw out prior precedent and impose a new approach to an important constitutional right, but at present the application of the Confrontation Clause in many cases is every bit as unpredictable as it was under the prior approach *Crawford* replaced. We must hope that the Court will soon choose another case in which to address these issues—and that the decision in that case, unlike *Giles*, will produce more clarity than confusion.